

nature of this deficiency and its magnitude in relation to all the other public participation provisions of the Texas program, the Secretary of the Interior has determined this to be a minor deficiency. Accordingly, the program is eligible for conditional approval under 30 CFR 732.13(i), because:

1. The deficiency is of such a size and nature as to render no part of the Texas program incomplete since all other aspects of public participation in the program meet the requirements of SMCRA and 30 CFR Chapter VII and this deficiency, which will be promptly corrected, will not directly affect environmental performance at coal mines;

2. Texas has initiated and is actively proceeding with steps to correct the deficiencies; and

3. Texas has agreed, by letter dated January 28, 1980, to correct the deficiency by June 15, 1980.

Accordingly, the Secretary is conditionally approving the Texas program. This approval shall terminate if regulations correcting the deficiency are not enacted by June 15, 1980.

This conditional approval is effective February 16, 1980. Beginning on that date, the Texas Railroad Commission shall be deemed the regulatory authority in Texas, and all Texas surface coal mining and reclamation operations and all coal exploration in Texas shall be subject to the permanent regulatory program. See 44 FR 77440 (December 31, 1979), in which the Department of Interior adopted rules making the permanent program applicable in a State on the date a State program is approved.

On non-Federal and non-Indian lands in Texas, the permanent regulatory program consists of the State program approved by the Secretary.

There are no coal-bearing Indian lands in Texas.

On Federal lands, the permanent regulatory program consists of the Federal rules made applicable under 30 CFR Chapter VII, Subchapter D—Parts 740–743. In addition, in accordance with Section 523(a) of SMCRA, 30 U.S.C. 1273(a), the Federal lands program in Texas shall include the requirements of the approved Texas permanent regulatory program.

The Secretary's approval of the Texas program relates at this time only to the permanent regulatory program under Title V of SMCRA. The approval does not constitute approval of any provisions related to implementation of Title IV under SMCRA, the abandoned mine lands reclamation program. In accordance with 30 CFR Part 884, Texas may submit a State Reclamation Plan

now that its permanent program has been approved. At the time of such a submission, all provisions relating to abandoned mined lands reclamation will be reviewed by officials of the Department of the Interior.

The approval of the Texas program is effective February 16, 1980, in accordance with a stipulation entered between the Secretary and plaintiffs in *In re: Permanent Surface Mining Regulation* (D.D.C., Civ. Act. No. 79–1144). This stipulation afforded the plaintiffs 30 days notice and an opportunity to challenge before the District Court in the District of Columbia, the Secretary's approval. Hereafter, it is expected that State program approvals for other States will be effective on the date of the **Federal Register** notice announcing the approval, in accordance with 30 CFR 732.13(h).

#### Additional Findings

The Secretary has determined that, pursuant to Section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this conditional approval.

The Secretary has determined that this document is not a significant rule under E.O. 12044 or 43 CFR Part 14, and no regulatory analysis is being prepared on this conditional approval.

Dated: February 7, 1980.

Cecil D. Andrus,

Secretary of the Interior.

A new Part, 30 CFR Part 943 is adopted to read as follows:

#### PART 943—TEXAS

Sec

943.1 Scope.

943.2–943.9 [Reserved]

943.10 State Program approval.

943.11 Conditions of State Program approval.

Authority: 30 U.S.C. 1253.

##### § 943.1 Scope.

This part contains all rules applicable only within Texas which have been adopted under the Surface Mining Control and Reclamation Act of 1977.

##### §§ 943.2–943.9 [Reserved]

##### § 943.10 State Program Approval.

The Texas State program, as submitted July 20, 1979 and amended November 13, 1979 and December 20, 1979 is approved, effective February 16, 1980. Copies of the approved program are available at:

Texas Railroad Commission, Surface Mining and Reclamation Division, Field Office, Suite 125, 1121 East SW Loop 323, Tyler, Texas 75703;

Texas Railroad Commission, Surface Mining and Reclamation Division, Field Office, Shank Office Building, 1419 3rd Street, Floresville, Texas 78114;

The Office of Surface Mining Reclamation and Enforcement, Scarritt Building, 818 Grand Avenue, Kansas City, Missouri 64106, telephone (816) 374–3920; and Office of Surface Mining, Room 135, Interior South Building, 1951 Constitution Avenue, Washington, D.C. 20240, telephone (202) 343–4728.

##### § 943.11 Conditions of State Program Approval.

The approval of the State program is subject to the following condition:

The approval found in § 943.10 will terminate on June 15, 1980, unless Texas submits to the Secretary, by that date, copies of fully implemented regulations containing provisions which are the same or similar to those in 43 CFR 4.1290–4.1296, relating to the award of costs, including attorneys fees, in administrative proceedings.

[FR Doc. 80–6115 Filed 2–26–80; 8:45 am]

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# Endangered Species Federal Register

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Wednesday  
February 27, 1980

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## Part IV

### Department of the Interior

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Fish and Wildlife Service

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### Department of Commerce

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National Oceanic and Atmospheric  
Administration

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Rules for Listing Endangered and  
Threatened Species and Designating  
Critical Habitat

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Parts 17, 402, and 424

## Rules for Listing Endangered and Threatened Species, Designating Critical Habitat, and Maintaining the Lists

**AGENCIES:** Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

**ACTION:** Final rule.

**SUMMARY:** The Services issue final rules for revising and maintaining the Lists of Endangered and Threatened Wildlife and Plants and for determining listed species' Critical Habitats. Procedures for receiving and considering petitions to revise the lists and for conducting periodic reviews of species contained on the lists are also adopted. These final rules implement the listing requirements of section 4 of the Endangered Species Act of 1973, as amended.

**DATES:** This rule becomes effective March 28, 1980; the amendments to §§ 17.11 and 17.12 will become effective upon republication of the lists of species, but not sooner than March 28, 1980, nor later than June 1, 1980.

**ADDRESS:** Interested persons or organizations having questions concerning this action may address them to the Director (OES), U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240.

**FOR FURTHER INFORMATION CONTACT:** Mr. John L. Spinks, Jr., Chief, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C. 20240 (703/235-2771).

## SUPPLEMENTARY INFORMATION:

## Background

The Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, establishes a comprehensive program to conserve Endangered and Threatened species of fish and wildlife and plants. Section 4 of the Act, 16 U.S.C. 1533, sets forth procedures for listing species, designating their critical habitat, and maintaining the Lists of Endangered and Threatened Wildlife and Plants. The Act also authorizes the Departments of the Interior and Commerce to issue rules to carry out its purposes.

The section 4 requirements as originally enacted in 1973 were straightforward and did not require comprehensive implementing rules. As a result, the Services have previously implemented only limited portions of section 4. These rules are presently found at 50 CFR 17.11, 17.12, 17.13 and 402.05.

Congress enacted the Endangered Species Act Amendments of 1978 on November 10, 1978. Public Law 95-632, 92 Stat. 3751. These Amendments significantly modified the procedural requirements both for listing species and designating their Critical Habitat. The Services determined that comprehensive implementing regulations should be promulgated to insure full compliance with the section 4 requirements and to aid the public in understanding the rulemaking process, pursuant to which Endangered and Threatened species are protected.

Accordingly, on August 15, 1979, the Services proposed rules to implement the section 4 listing and Critical Habitat requirements. See 44 FR 47862-47868. In general, that document proposed how the Services would proceed in revising and maintaining the Lists of Endangered and Threatened Wildlife and Plants, designating Critical Habitat, reviewing petitions to revise the lists, and conducting periodic reviews of species.

Subsequent to the publication of the proposed rules, Congress enacted the Endangered Species Act Amendments of 1979. See Pub. L. 96-159. The Amendments to section 4 were generally modest. To the extent practicable, these changes have been incorporated into these final rules. However, in certain instances complete incorporation was impossible. For instance, the new amendments require that guidelines be developed on a number of points after public comment. (See 1979 Amendments, section 3[h]). These guidelines are being prepared and will be published in draft form in the near future.

The Services today issue comprehensive final rules interpreting and implementing the general requirements of section 4 of the Act. The final rules for the most part adopt the approach suggested in the proposal. Significant modifications are described below in the section-by-section analysis of the comments.

The Services are in the process of reorganizing Title 50, Chapter IV of the Code of Federal Regulations for the purposes of clarity. To begin implementing this policy, the rules proposed at Part 405 are being published in Part 424 of Title 50. The table below is provided to cross-reference the

proposed and final sections to avoid confusion.

Final section	Proposed section
424.01.....	405.01
424.02.....	405.02
424.10.....	405.10
424.11(a).....	405.11(a)
424.11(b).....	405.11(b)
424.11(c).....	405.11(c)
424.11(d).....	405.11(a)
424.12(a).....	405.12(a)
424.12(b).....	405.12(b)
424.12(c).....	405.12(c)
424.12(d).....	405.12(d)
424.12(e).....	405.12(e)
424.12(f).....	405.12(f)
424.12(g).....	N/A
424.12(h).....	N/A
424.13.....	405.13
424.14.....	405.14
424.15.....	405.15(a)
424.16(a).....	405.15(b)
424.16(b).....	405.15(c)(1)-(5)
424.17(a).....	N/A
424.17(b).....	405.15(c)(1) and 405.15(c)(6)
424.18(a).....	405.15(c)(6)(iii)(D)
424.18(b).....	405.16(a)
424.18(c).....	405.16(b)
424.18(d).....	405.16(c)
424.18(e).....	405.16(d)
424.19.....	405.17
424.20.....	405.18

## Summary of Comments Received

The Services received 72 letters commenting on the August 15 proposal. The sources of these comments were as follows: one Member of Congress, 10 Federal agency offices, 22 State Governors or agencies, and 39 citizens, private firms, and interest groups. Significant issues discussed in the comments are summarized below in section order.

## § 17.11—Endangered and Threatened Wildlife

One comment argued that the Services have no authority to list a species as Endangered or Threatened because of its similarity of appearance to a listed species or because it constitutes a captive population of otherwise protected species. The Services have clear authority to treat as Endangered or Threatened any species that is similar in appearance to a listed species. See section 4(e) of the Act and 50 CFR § 17.50 *et seq.* The Services also have authority to list and regulate Endangered or Threatened species held in captivity. See *Cayman Turtle Farm v. Andrus*, 478 F. Supp. 125 (D.D.C. 1979), and relevant statutory authority and legislative history cited therein. Further, subsequent to the promulgation of the proposed rules, the Fish and Wildlife Service adopted final rules (44 FR 54002-54008) for the protection of captive species and withdrew those relating to captive self-sustaining populations. This modification is reflected in the final rule.

Another comment suggested that Critical Habitat areas should be clearly delineated, and suggested that the map constitute the definition of the area's boundaries. The Services agree that Critical Habitat areas must be clearly defined, and intend to provide precise boundary information in rulemakings. See § 424.12(d). The Services will also include Critical Habitat maps that portray the Critical Habitat areas as precisely as possible. The description of the area will prevail over the area denoted by the map in the case of conflict.

Several commenters suggested that names used in listing be either those with widest currency for the species involved or those approved by appropriate professional societies. Scientific names used in the lists will be those most widely accepted by specialists in that group of taxa. In making this determination, the Services will rely to the extent practicable on the *International Code of Zoological Nomenclature* and the *International Code of Botanical Nomenclature*.

To avoid ambiguity in cases in which more than one name is commonly used for a taxon, synonyms will be provided. Such synonyms are expressed in parentheses with the name itself preceded by an equal (=) sign.

One comment indicated that updating the "historic range" column of the table should occur only after a full rulemaking was completed. This information is not required by the Act (See section 4(c)(1)) and is intended only as an aid to interested persons. Therefore, the Services believe it unnecessary to engage in rulemaking to make the minor, technical changes contemplated.

#### § 17.94—Critical Habitats

One comment questioned the notion of "constituent elements" included in this section. The term is used to clarify that a Critical Habitat determination may impact only those activities that affect those aspects of the Critical Habitat essential to the conservation of the species. A partial listing of some of the primary constituent elements is found in § 424.12.

#### § 424.02 Definitions

The Services received a number of comments on the proposed definitions, as well as suggestions for defining additional terms.

#### "Conservation"

Several comments suggested that "conservation" be defined. This term is an essential one in interpreting both the Act and implementing rules and has been defined in this rule in the manner

set out in the Act. See section 3(3), 16 U.S.C. 1532(3).

#### "Critical Habitat"

Two comments suggested that criteria be developed to identify areas "essential for the conservation of the species," a phrase taken from the definition. Although the precise biological factors essential for the conservation of a species will vary considerably from case to case, the Service has proposed the general biological requirements it will review in making this determination. See 44 FR 47864 and § 424.12(b) of these rules. Specific comments on these criteria are summarized below.

A number of comments expressed concern over the perceived possibility that Critical Habitat could be designated in an unwarranted manner for areas outside the geographical area occupied by the species at the time of listing. Several suggested that precise criteria should be developed to insure that these areas truly constitute Critical Habitat. This suggestion has not been accepted. The definition of "Critical Habitat" includes specific language directing the manner in which the Services will proceed in designating Critical Habitat areas outside the present range of species, and further criteria are unnecessary. The Services will closely scrutinize any area outside the geographical area occupied by a species before designating it Critical Habitat. Areas outside the geographical range of a species will be designated Critical Habitat only if necessary to ensure the conservation of the species. See § 424.12(e).

One comment suggested that the language contained in sections 3(5) (B) and (C) of the Act, 16 USC 1532(5) (B) and (C), should be included in the definition of "Critical Habitat" adopted in the final rule. Paragraph B authorizes the Services to designate Critical Habitat for species for which no Critical Habitat has been determined previously. Although the Services believe the rules as proposed would authorize designation of Critical Habitat for listed species, it has adopted this suggestion to avoid any ambiguity. Since the provision constitutes guidance on the application of the definition rather than a part of the definition itself, the operative language appears at § 424.12(g). The Services reject the suggestion that the definition specifically state that Critical Habitat shall not include the entire geographical area which can be occupied by the species "except in those circumstances determined by the Secretary." This provision is of sufficient clarity to permit

proper administration of the Act without including it in these rules.

One comment suggested that reference to "special management considerations or protection" in the definition improperly emphasized management procedures over physical and biological features essential to the conservation of the species. Neither the Act nor the legislative history indicate that reading to be the correct one; both place strong emphasis on physical and biological features. As a result, the Services have made no modification in the definition.

One comment suggested that the definition should specify that a species be listed before Critical Habitat can be designated. The Act clearly provides that Critical Habitat shall be designated, to the maximum extent prudent, at the time the species is listed. See section 4(a) of the Act, 16 USC 1533(a). For this reason, the comment is rejected.

#### "Endangered Species"

Three comments pointed out that the proposed definition does not include the limitation on insect pests set out in the Act. See Section 3(6) of the Act, 16 USC 1532(6). The Services adopt this suggestion and include the appropriate statutory language in the definition of "species".

A number of groups commented on the "significant portion of its range" phrase of both this definition and that of "Threatened species"; all suggested further articulation of the term. One suggested that "range" be defined as that area normally inhabited by the species 30 years prior to the proposal as determined by a consensus of experts qualified in the study of that species. This suggestion is rejected. Not only is there no basis for arbitrarily establishing a 30-year base line to make such determinations, but the proposed requirement to reach a consensus of experts makes this suggestion administratively infeasible.

Another commenter suggested consideration of the number of individuals, their degree of productivity, and the geographical arrangement of populations in making this determination. The Services recognize a species should not be subject to the protection of the Act because a small proportion of individuals of the species are in danger of extirpation. However, what constitutes a significant portion of a species' range varies greatly from species to species. In light of this broad diversity and the guidance of both the Act and the legislative history, the Services find it inadvisable to establish new criteria as suggested. The Services will continue to consider this issue,

however, and will propose criteria at a later date, if warranted.

One comment suggested that the definition be limited to species formally listed by the Director. This suggestion has not been accepted since the regulations provide procedures pursuant to which a species is to be listed; the term indicates those species that may be listed under the Act.

One comment indicated that the proposed definitions of "Endangered species" and "Threatened species" were too nebulous and had been used in the past to list fish and wildlife for political rather than scientific reasons. The Services believe that the language is consistent with and specific enough to provide guidance in administering the Act, and reject the latter assertion.

#### *"Public Meeting" and "Public Hearing"*

A number of comments suggested that "public meeting" and "public hearing" be defined to clarify the distinction between the two. This suggestion has been accepted. A public meeting is a gathering to permit an informal exchange of information on a regulatory proposal rather than an informal presentation by the Services of all the evidence that supports the proposed rule. A public hearing provides the public a forum to comment in a more formal manner on a Critical Habitat proposal and, if appropriate, the accompanying listing proposal, since those comments will be transcribed by a reporter. See H. Rept. 95-1804, 95th Cong. 2d Sess. 27(1978), H. Rept. 96-697, 96th Cong. 2d Sess. 10-11 (1979).

#### *"Special Management Considerations and Protection"*

Most comments received on this definition were directed at one of two points. First, several comments suggested that the definition should focus on physical and biological features of the Critical Habitat rather than conservation of the species. Second, a few comments focused on the level of need for the special management considerations and protection.

The Services have accepted those comments on the first point, since that approach comports more closely with the language of the Act. The Services have also retained the conservation component of this definition since protection of physical or biological features is of utility only insofar as it aids in achieving the legislative policy of conserving listed species.

Comments on the second point were more diverse: suggestions ranged from requiring that special management considerations or protection be essential to that they be solely of aid to the

species. Examination of the legislative history of the Critical Habitat definition provides little guidance on the meaning of this term, and the Services have turned to the expressed purpose of the Act to interpret it. The Services believe the policy of the Act is best satisfied if the term is interpreted as encompassing all methods or procedures useful in protecting physical or biological features for the conservation of the species. That formulation authorizes the Services to designate Critical Habitat even when existing management and protective schemes offer some level of protection to the species.

A few comments suggested that methods and procedures encompassed by the definition be limited to those which are "feasible" or "most effective". The Services intend to consider reasonable management options, and do not believe that addition of these words would clarify the definition.

One comment questioned the authority of the Services to define the term since there is no statutory definition. The Services, as the agencies designated to enforce the Act, have authority to interpret the Act within the constraints set out by Congress, as recognized in the Endangered Species Act. Interpretation of this term will aid both the public in understanding agency actions and the Services in administering the Act.

#### *"Species"*

A number of comments pointed out that the proposed language could be read to exclude fish or wildlife or plant species. Some suggested that the problem be rectified by using the word "includes" rather than "means" in the manner set out in the statutory definition; others that "species" be inserted after "means". The Services have clarified the scope of the definition by changing "means" to "includes". This formulation also authorizes the Services to list taxa at levels higher than species. However, the Services will list those taxa only if all component species are individually Endangered or Threatened. See § 424.11(a).

One comment suggested that the proposed "fish and wildlife" language be changed to "fish or wildlife", a term defined by the Act. This comment has been accepted. The commenter also suggested that the distinct population concept would be clarified if the term "subspecies" were deleted from the proposed language. The Services have also accepted this comment.

The Services rejected as unnecessary those comments suggesting that the definition mention invertebrates as well as vertebrates, require successful

interbreeding to constitute a species, or specify that the distinct population concept be linked to the term "significant portion of its range" contained in the "Endangered species" definition. The present language of the final rule and the relevant legislative history indicate the scope of the definition on these points.

Two comments suggested that the proposed definition was not precise enough from a biological point of view but offered no suggested changes. The Services believe that the definition in this final rule adequately meets both legal and scientific requirements.

#### *Other Comments*

A few comments recommended that other terms be defined—"special rule", "federal agency", "irresolvable conflict", "permit or license applicant", or "state agency". Many of these terms are not used in the rules and are therefore not defined; the meaning of the others is sufficiently clear as not to require further definition. The Services have defined "plant" and "fish and wildlife" as suggested in the manner set out in the Act.

One comment noted that the Act's provisions speak in terms of actions of the appropriate Secretary rather than the respective Directors, and suggested that reference in the rules to the Director be changed to the Secretary. The Services believe that reference to the Director makes the rules clearer, since in both agencies appropriate authority has been delegated to that officer. The delegation has been undertaken pursuant to the Secretaries' authority, including 5 U.S.C. 302.

#### *§ 424.10—General*

One comment suggested that the criteria for listing and delisting a species should be the same. This is the intent of the Services. Delisting procedures have been included in the final rule. See § 424.11(d).

#### *§ 424.11—Factors for Listing, Reclassifying, or Removing Species*

§ 424.11(a). Several comments either questioned the methods by which the Services would arrive at taxonomic distinctions, or suggested that the rules require the Services to consult appropriate professional societies in evaluating the taxonomic status of candidate species. The substance of this suggestion has been adopted. In deciding which of alternative taxonomic interpretations to accept, the Director will rely on the professional judgment available both within the Service and the scientific community and from the most recent taxonomic studies available

pertaining to the subject species. However, no criteria other than these very general ones can be established for acceptance of taxonomic treatments. As a matter of practice, the Services review current taxonomic literature in considering the appropriateness of present and proposed listings. Although professional societies maintain lists of accepted taxa for some taxonomic groups, this is not true for all groups. The Services will rely on generally accepted lists of taxa when they are available.

One comment questioned the Services' authority to list taxa of higher rank than species. There has been some confusion regarding the Services' use of the term "taxon", particularly regarding taxa of higher rank than species. It is not the Services' intent that such taxa be listed as Endangered or Threatened except on a finding that all known species included in the taxon of higher rank qualify individually for such listing. This position is consistent with the rules in their final form.

Another comment suggested that the Services be required to consult with all State and private wildlife agencies in determining a species' eligibility for listing. Before proposing a species for listing, the Services routinely seek information from many authorities on the species involved. As a matter of policy this practice will continue. However, difficulties involved in determining which States and private wildlife agencies might be appropriate and contacting them makes the proposal administratively infeasible.

§ 424.11(b). One comment suggested that this subsection should be modified since it took a more mandatory position toward listing a species than required by the Act. This comment has not been accepted since the Act does mandate that all legitimately Endangered or Threatened species be listed.

One comment suggested that the information supporting a listing action be required to be "adequate" and that any deficiencies in supporting information be pointed out at the time of listing. The Services will base listing actions on the best scientific and commercial data available to the Director at the time of listing, which is "adequate" under the Act. Occasionally this may mean that some information regarding the life history and biology of a species is lacking at the time that it is listed, when such information is not necessary to establish that the species is Endangered or Threatened. Deficiencies in the supporting data base are inferable from the preamble of the proposed rule and this portion of the comment is thus rejected.

One comment pointed out that a number of the factors set out in subsection 424.11(b) were not identical to those contained in the Act and suggested that the proposed rules be modified accordingly. This suggestion has been rejected. The Services have not interpreted the statutory language in the manner set out in the final rules. For instance, the factor referring to the "inadequacy of regulatory mechanisms" requires the Services to make a finding which can be interpreted as suggesting that local, State, Federal or international protective schemes are improperly administered. The final rules clarify that, in determining whether regulatory mechanisms are "adequate," the Services will examine whether or not existing mechanisms prevent the decline of the species or the degradation of its habitat. Similarly, the Services have interpreted the biologically uncertain term "overutilization" of section 4(a) to mean utilization that has detrimentally affected the species. In both cases, it should be recognized that the statutory factors are open-ended. See Section 4(a)(1)(5) of the Act, 16 U.S.C. 1533(a)(1)(5). Further, the Services must still find the species to be "Endangered" or "Threatened" as those terms are defined by statute and in these rules.

A number of comments suggested that disease or predation not be considered a reason to list a species unless it seriously depletes a species' numbers or affects its productivity, or that only "detrimental" destruction of habitat or range be considered. These comments have been rejected. The touchstone for listing species is whether they are "Endangered" or "Threatened". Restricting the scope of the factors leading to that status could result in the anomalous situation of preventing the Director from listing an otherwise eligible Endangered or Threatened species.

Several commenters questioned the wisdom of attempting to save species in danger of extinction from natural causes. The Act does not differentiate between natural and other causes of Endangered or Threatened status. Further, in practical terms, it is usually not possible to distinguish natural from other factors operating on the species.

§ 424.11(c). A large number of commenters interpreted the proposed language as absolutely mandating the listing of all species protected by international agreements. For this reason, some suggested deletion of the proposed section and one suggested that language be adopted indicating listings under international agreements should not in and of themselves constitute sole

justification for listing species under the Act.

The Services did not intend the provision to *require* listing under the Act, and believe the proposed language has been misunderstood. The Services will independently examine whether the requirements for listing a species under the Endangered Species Act have been met. The language of this subsection has been clarified in the final rule.

Many comments were directed at the weight the Services should give international agreement listings in listing species under the Act. A number indicated that listings under these agreements, particularly on the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), had occurred for reasons other than scientific ones. Others suggested that CITES listings often included higher taxa and covered specific species ranges possibly inappropriate to an Endangered Species Act listing. For these reasons, they suggested the proposed provision be deleted or modified to provide that international agreement listings should not constitute substantial evidence for listing a species under the Act.

The Services agree that the scientific and commercial data relied upon by the signatory nations in protecting a species under international agreement varies from case to case. For instance, as a general rule, CITES listings made prior to the adoption of the Berne Criteria in 1976 have less supporting evidence than those occurring after that time. On the other hand, the fact that several nations have determined that international protection is necessary to conserve a species constitutes evidence that a species should be protected under the Act, although the weight of the evidence is unclear without examining the facts on a case-by-case basis. As a result, the Services included language in the preamble to the proposed rule to this effect. Similar language has been adopted in the final rule for purposes of clarity.

Another comment suggested that listing under the Act was unnecessary if a species was listed under an international agreement, since its protection was already mandated by law. The Services disagree with this view; protections afforded by international agreements are not identical with those provided by the Act.

A number of comments interpreted the proposed section as contradictory to the procedural and substantive requirements for listing species found in section 4 of the Act. This is not the Services' intent; all procedural and

substantive requirements of the Act must be complied with prior to listing a species. The Services also do not view this section as inconsistent with the requirements of section 4(a) as suggested by two comments, since listing on an international agreement indicates that one or more of these factors may have contributed to the decline of the species.

A final commenter suggested that the Services had exceeded the authority provided by section 4(b)(3) of the Act, 16 U.S.C. 1533(b)(3) since the proposed language was broader than the language appearing there. Although the language of the final rule is broader than that of the Act, it implements a number of sections and is well within the legal authority of the Services to adopt rules implementing the Act.

§ 424.11(d). The Services have also adopted a provision articulating the manner in which they will proceed in deleting a species from the lists. This provision clarifies what was implicit in the proposed rule. The Services will evaluate on the basis of the best scientific and commercial data available to them whether the species is Endangered or Threatened. A species may be deleted if the Services determine that (1) it is extinct, (2) it has recovered to a point above that at which it would be listed as Threatened, or (3) the original data were in error.

#### § 424.12—Criteria for Designating Critical Habitat

§ 424.12(a). One comment suggested that subsection 424.12(a) be modified to clarify that Critical Habitat determinations are to be made by regulation at the same time a species is proposed for listing. This suggestion has not been accepted since the language conforms with that of section 4(a) of the Act, and requires contemporary designation of Critical Habitat when appropriate through the rulemaking process.

One commenter suggested that this section be modified to clarify that the Services could designate Critical Habitat within foreign countries. The Services have not accepted this comment since they have interpreted the Critical Habitat portion of section 7(b) as applicable only to areas under United States jurisdiction and the high seas. The Services do believe, however, that the "jeopardy" component of section 7(a) is applicable to the actions of United States federal agencies in foreign nations.

One comment suggested that the subsection be changed to clarify that Critical Habitat need be designated only when a species is listed and not when it

is reclassified from Threatened to Endangered. This reading conforms with the language of the Act and has been accepted.

A number of general comments were received on the factors proposed for determining when the designation of Critical Habitat is not prudent. One comment suggested the factors should be extremely narrow since the designation of Critical Habitat brings into play the additional public notice requirements imposed by the Act and rules; another comment indicated that the factors should be broadened to permit the Services not to designate Critical Habitat when the action would not clearly benefit the species; and still another comment suggested the deletion of the factor of lack of benefit to the species.

The Services believe that interpretation of the "maximum extent prudent" language should be guided by the broad purpose of the Act to conserve Endangered and Threatened species. See Sections 2 (b) and (c) of the Act, 16 U.S.C. 1532. The legislative history of section 4(a) makes clear that Critical Habitat should be designated when in the "best interest of the species to do so." H. Rept. No. 95-1625, 95th Cong. 2d Sess. 16 (1978). The rules have thus been written to require the Services to designate Critical Habitat at the time of listing when that action would benefit the species. The Services believe that in most cases Critical Habitat designation will benefit the species; however, when that course would not benefit the species, the Services will not designate Critical Habitat.

The Services have adopted the suggestion that the proposed language be modified to clarify that the factors set out do not constitute the sole grounds for a determination that designating Critical Habitat would not be prudent. This change is advisable because circumstances that may make Critical Habitat designation inappropriate are varied and difficult to foresee, and the enumerated factors might be interpreted as foreclosing a determination of lack of prudence in some cases when it was justified.

Comments expressing conflicting points of view were also received on subsection 424.12(a)(1). One comment suggested that the language restricting the factor to species in need of immediate listing be broadened; another suggested that the factor is unnecessary because of the emergency listing provisions of the Act and regulations. The Services have deleted this provision because of the recently liberalized emergency listing rules. The Services also note that to the extent the species is

not benefited by Critical Habitat designation, that action need not be taken.

One commenter suggested that the criteria for determining whether a Critical Habitat determination is not prudent should be addressed separately for plants and animals. The Services believe that tailoring these procedures to individual taxonomic groups is unnecessary and would cause confusion.

§ 424.12(b). One commenter contended that it made little sense to specify physiological, behavioral, ecological and evolutionary requirements essential to the conservation of a species because such requirements were either responsive to external stimuli or undefinable as components of a Critical Habitat. The Services disagree that such requirements are either extrinsic or undefinable. These factors have been considered in previous Critical Habitat designations and have proven a useful administrative tool.

Several commenters suggested alternate wording for § 424.12(b) which would make it follow more closely the statutory definition of Critical Habitat. This subsection has been reworded to follow the statutory language more closely than did the proposal.

Two comments were received that questioned the appropriateness of the "special management considerations and protection" language in this subsection. This provision is taken from the definition of "Critical Habitat" found in the Act. See section 3(5) of the Act, 16 U.S.C. 1533(5). Further discussion of this provision appears above. See § 424.02.

One commenter suggested that § 424.12(b)(1), which describes requirements essential for the conservation of listed species as including "space for individual and population growth \* \* \*", be applied only to determinations of Critical Habitat for stable populations. This suggestion has been rejected. Population growth is an essential component of the recovery of many listed species and is in keeping with the conservation policy of the Act.

One commenter suggested that § 424.12(b)(5) be entirely deleted because it is implicit in the definition of Critical Habitat. This comment is rejected. The Services believe that the material contained in the subject paragraph represents a useful clarification of the requirements for Critical Habitat.

One commenter suggested that the reference to "disturbances" in § 424.12(b)(5) be replaced by "destruction or adverse modification of constituent elements." This latter

phrase, which appears in § 17.94(a), relates specifically to the responsibility of Federal agencies under section 7 of the Act with regard to Critical Habitats. "Disturbance," as used in § 424.12(b)(5), is intended to be broader.

One commenter suggested that the words "and ecological" be inserted in § 424.12(b) after "geographical". The Services accept this suggestion as a useful clarification in specifying Critical Habitat.

One commenter suggested alternate wording of this paragraph to make more explicit the list of constituent elements that should accompany the description of a Critical Habitat. The Services have substantially adopted the suggested alternate wording because it will produce added clarity.

One commenter suggested that protection from disturbances should not necessarily be an absolute requirement in considering areas for Critical Habitat designation and that emphasis should be placed on designating habitats protected from those disturbances that might be adverse or detrimental to the species in question. In considering protection from disturbance as one of these factors it should be understood that only those disturbances effecting the value of the habitat for the species under consideration will be taken into account. The Services consider this to be sufficiently clear, and no alteration of the proposed language is necessary.

§ 424.12(c). One commenter argued that the Director's consideration of the economic impacts of designating Critical Habitat is too narrowly confined to the impacts on property owners involved and that additional detail on all types of impacts should be provided. The Services did not adopt this comment, since the rule as written does not limit the economic impacts to only those which may affect the property owners; instead it covers significant economic impacts generally, which include regional and other impacts. Since the rules comprehensively include all economic and other impacts for consideration, the detailed application of this standard to particular factors is better left to a case-by-case analysis rather than placed in these general rules.

One comment suggested that the consideration given to economic effects is too broad, and could reduce the protection afforded listed species. The commenter noted that under the proposed rule, there could be a "step-by-step exclusion of a species' habitat from Critical Habitat" due to economic considerations which could reduce the Critical Habitat to the point at which the species is on the verge of extinction. The comment basically suggests that the

rules should make explicit that the cumulative effects of incremental losses of Critical Habitat should be considered. The balancing approach in the present rules contains elements of such a consideration, since the less habitat there comes to be for any species, the more biologically important the remaining habitat becomes. The more biologically important a habitat portion is, the greater the degree of economic impact necessary to require exclusion of that habitat portion. However, the commenter is correct that decrease in Critical Habitat area size may result from the economic impact consideration; this result is a consequence of the present law, section 4(b)(4) of the Act, 16 U.S.C. 1533(b)(4).

One commenter argued that too broad a reach is given to the economic impact analysis requirement. The comment states: "since the duty imposed by section 7(a) to avoid jeopardizing the survival of listed species is independent of the duty to avoid destruction of critical habitat, an extensive and detailed economic analysis under section 4(b)(4) would neither be necessary nor of much consequence." The comment's suggestion would unreasonably limit the scope of an economic impact analysis to the point at which it is, as the commenter admits, inconsequential. The legislative history of this section is to the contrary, and indicates that Congress believed it was creating a substantive and important change in the Act which could significantly affect the scope of the requirement to designate Critical Habitat. The rules therefore indicate that all economic or other relevant impacts of section 7(a) involved in the designation of an area as Critical Habitat should be considered.

One comment proposed that only presently available information be considered in an economic analysis. Although an economic impact analysis can often be done by analyzing currently available information, occasionally raw data may have to be collected or processed to form meaningful information which the Services can consider. Therefore, this comment was not adopted.

One comment proposed that in the consideration of economic effects of a proposed Critical Habitat, that only "significant effects" on "major activities" planned or underway in the area should be considered. The Services believe a rule of reasonableness is to be applied in identifying activities which may be affected by Critical Habitat designation. In order to adversely affect a Critical Habitat area, an activity must

significantly affect the area in a detrimental manner. In order to be potentially affected by Critical Habitat designation, an activity must also be a Federal action, or have Federal involvements. The Services have clarified the regulation to reflect this rule of reasonableness.

A commenter requested a clarification of whether areas into which listed species are transported or introduced can become Critical Habitat. As indicated in the preamble to the proposed regulations (44 FR 47862) the Services are considering a regulatory mechanism to provide flexible management for reintroduced populations of listed species. The Services have not yet determined the appropriate method for achieving that end.

One commenter suggested that this subsection be expanded to provide examples of the types of impacts, in addition to those of an economic nature, that would be considered in analyzing the effects of a Critical Habitat designation. In amending the Act to provide for analysis of the possible impacts of Critical Habitat designations, Congress specifically referred to economic impacts. Other types of impact, which may take many forms, will depend upon the specific circumstances surrounding a Critical Habitat designation, and are to a considerable extent unpredictable at this time. As a result, the Services have not adopted rule language on these other impacts. However, the Services intend to consider all identifiable relevant impacts on a case-by-case basis.

One commenter suggested that Critical Habitat designations be based only on biological considerations, and that economic factors should only be used in subsequent management decisions. The Act requires that economic factors be considered in the delineation of Critical Habitat. See section 4(b)(4); 16 U.S.C. 1533(b)(4).

§ 424.12(d). Several commenters indicated that the proposed rule was not sufficiently clear in setting out the method by which Critical Habitat boundaries would be described, or that references to ephemeral features should be completely prohibited in describing Critical Habitat. The Services agree, and the final rule has been revised to clarify the method of description of Critical Habitat and prevent the use of ephemeral features in such descriptions. See also the discussion at § 17.94 above.

§ 424.12(e). Many commenters objected to the possibility that an inclusive area might be designated as Critical Habitat when several suitable habitats are located in close proximity.

The allowance for the designation of an inclusive area as Critical Habitat is intended only to alleviate the potential problem of an unnecessarily complicated description of Critical Habitat that would result if a number of very local and disjunct habitats were to be designated individually. The Services intend to use this authority only in cases where suitable habitat areas are extremely close together.

§ 424.12(f). This subsection implements the statutory requirement for designating as Critical Habitat an area outside the geographic range of the species. See the discussion at § 424.02 above.

§ 424.13. *Sources of information and relevant data.* One commenter suggested that there be a specification that data reviewed consist of the best scientific and commercial data available. The Services will review the available data and make their determinations on proposed and final rules on the basis of the best scientific and commercial data available to them.

One commenter recommended that formal procedures for notification and a review and comment period be instituted in consideration of data supporting possible revisions of the lists. This recommendation is rejected. The Services believe that formal agency notification and review and comment properly follow the publication of a notice of review or proposed rule in the *Federal Register* as part of the normal rulemaking process. To require another round of notices and proposed rulemaking would provide only marginal benefits, as the Department of the Interior has determined in its rules implementing Executive Order 12044. See 43 CFR Part 14.

The Services have also implemented the requirement imposed by the Endangered Species Act Amendments of 1979 to conduct a review of the status of a species before proposing it for listing. The Services interpret this provision as requiring the preparation of a brief summary of information available on the status of the species. The status review will include as appropriate, a summary of major studies on the species and the views of experts on this group of taxa.

#### § 424.14. *Petitions.*

§ 424.14(a). Several comments requested that the special procedures under the Act for reviewing a petition to list, reclassify or delist a species be applied to petitions requesting the Services to take other actions described in § 424.10, such as to designate or delete Critical Habitat. These special procedures require publication in the *Federal Register* of a notice when the director has found that substantial

evidence supports the petition, and publication of a status review on the species involved within 90 days of receipt of the petition.

The Services have not accepted these suggestions. Section 4(c)(2) of the Act clearly states that the special procedures described above are applicable only for petitions to review the status of "any listed or unlisted species proposed to be removed from or added to either list". Furthermore, the 1978 amendments to the Endangered Species Act imposed comprehensive procedures for Critical Habitat rulemakings that provide for extensive public participation and are particularly suited for Critical habitat determinations. The Services also note that the petition procedures imposed by section 4(c)(2) of the Act, such as a status review of the species, are not particularly appropriate in Critical Habitat cases.

One comment suggested that a periodic listing of petitions received be published in the *Federal Register* for informational purposes. Since a notice must be published in the *Federal Register* whenever a petition has met the requirements of the Act and these rules, the Services consider a periodic listing to be unnecessary.

One commenter recommended that the scope of organizations from which petitions might be received be broadened. The Services desire to receive petitions from any interested person, group, or organization, as indicated in the original proposal.

One commenter recommended that the Services collect their own data before responding to petitions. The Services' duty with respect to processing petitions must be interpreted in a manner reflecting the short time frame (90 days) in which they are statutorily required to act. The Services will review published studies, reports, and other sources of information on the species when examining the petition, but the Services cannot conduct field studies in most cases because of the statutory deadline. The comment is therefore rejected.

§ 424.14(b). One commenter suggested that petitions be reviewed to determine whether they were politically motivated or fabricated. The Services do not consider an examination of petitioners' motivation to be appropriate in reviewing petitions. Review by the Services is primarily concerned with a petition's presentation of biological information. A petition found to be based on fabricated information would be denied as not presenting substantial evidence. This circumstance is

adequately covered in the rules and no change has been made.

One commenter requested that the rule make clear whether the petitioner is responsible for providing data sufficient to form a basis for actions taken by the Services, or whether this responsibility lies elsewhere. The principal responsibility of a petitioner is to present substantial evidence relating to the status of the species. This may be less than that required to propose or finalize a listing. The Services intend to gather information from as many sources as are available before proposing an action, and bear the primary responsibility for gathering sufficient information on which to base such actions. The Services believe that this is clearly expressed in the rule.

Two commenters suggested that petitions requesting that species be removed from the lists should not be required to contain extensive background data regarding the species. The Services must make the same decision in the case of either listing or delisting—whether the species is Endangered or Threatened. The petition requirements are written consistent with this scheme.

One commenter suggested that this section presented an "impossible goal" for many species since in some cases past and present numbers and distribution of a species are unknown. The Services recognize that precise past and present numbers and distribution may not be available for many species, but are primarily concerned that whatever information is available be presented in a petition, even if such information is imprecise. It must be recognized that the Services are required to take action based on the best scientific and commercial data available at a given time and the rules are written to aid the Services in meeting this requirement.

A number of comments addressed the substantial evidence standard of § 424.14(b). One suggested that a significant evidence standard be adopted rather than a substantial evidence standard. This comment has been rejected since section 4(c)(2) of the Act, 16 U.S.C. 1533(c)(2), specifically imposes a substantial evidence standard.

One comment questioned the legal authority for the definition of "substantial evidence", and suggested that it be moved to the definitions section. The definition has been provided to clarify what evidence is needed to support a petition for purposes of the rules and section 4(c)(2) of the Act. The standard adopted is drawn from judicial decisions which

have interpreted the substantial evidence standard of the Administrative Procedure Act. The definition is not placed in the general definition section of these rules because it is a specific definition used only in this paragraph and is inapplicable to other uses of the term in the rules and in the Act.

Several comments addressed specific parts of the proposed definition. The word "quantum" was deemed inappropriate and has been changed to "amount" in the final rules; the "reasonable person" language has been retained since it constitutes an important component of the standard as interpreted by court decisions.

§ 424.14(c). Two comments suggested that the rules establish a time limit for the Director to determine whether petitions include substantial evidence. The Services have adopted the suggestion; the final rules provide that the Services will make the substantial evidence determination within 90 days.

One comment suggested that there was an unclear distinction between the evidence considered sufficient to warrant the acceptance of a petition and that required as the basis of a proposed listing. The Services disagree with this view; a petition is complete if it presents substantial evidence, a proposed listing requires a preliminary determination by the Services that the species is either Endangered or Threatened.

Several comments recommended the rules require that a Federal Register notice that a petition is under review either lead to a proposed rule within a specified time or be withdrawn. Both the Act and these rules require the Services to conduct and publish a review of the status of a species that is the subject of the petition within 90 days. No other time limits are necessary. The information needed to propose a rule may require some time to obtain, particularly if further field research must be completed.

One commenter suggested that the Services be required to consult with State agencies before publication of a notice that a petition had been accepted. Given the short statutory time for dealing with petitions, a further requirement to this effect is impracticable. However, as a discretionary matter the Services may consult with State conservation agencies in some cases.

Two comments inquired whether the publication of a status review, required by this section, is equivalent to the publication of a notice of review. The status review for petitions imposed by the Act is not the same as a notice of review. The latter is a discretionary

administrative tool for requesting further information.

§ 424.14(d). One commenter recommended that the Services be required to inform a petitioner whose petition is denied of the reason for denial. This recommendation is in keeping with the intentions of the Services and has been adopted in the final rule.

One comment requested that a procedure be established so that a petitioner could administratively appeal from a denial of a petition by the Director. The comment suggests that the most appropriate body to carry out these responsibilities would be an outside technical panel. Establishing an elaborate administrative appeal system would be expensive and unnecessary in light of the infrequency of problems in this regard in the past. The Services, however, will consider informal requests to review the denial of a petition.

One comment suggested that a specific time limit be established for the disposition of petitions relating to Critical Habitat. This suggestion has been rejected since the requirements of the Administrative Procedure Act, 5 U.S.C. § 553, and respective Departmental regulations require that such petitions be processed in a timely and appropriate departmental regulation.

#### Section 424.15—Notice of Review.

One comment suggested that the language of proposed § 405.15(a) be deleted because it would permit further consideration of petitions which are not supported by substantial evidence in a manner inconsistent with § 424.14. This comment has not been accepted. The notice of review provision is intended to be used primarily in cases other than petitions (which have their own specific procedures in § 425.14). This procedure provides the Services with a flexible management tool to gather necessary information, and also provides an added opportunity for public involvement before a formal proposed rulemaking. The Services believe this process is in keeping with the public involvement emphasis of the Act and Executive Order 12044.

Another comment suggested that private landowners should also be contacted in any notice of review. The Services have carefully considered this comment, but believe that such extensive notification procedures are not warranted at this early and tentative stage in the decision process. Often the tentative and broad nature of a notice of review would mean that no specific area involving the species could even be identified. Contacting local governments is required once Critical Habitat is

proposed, and the Services believe this is the best time to do so. The Services also note that State Governors are free to contact State or local groups for their comments, whenever the Governors feel such action is appropriate.

One commenter recommended that the Services avoid lengthy periods of review for species under consideration as Endangered or Threatened but for which a proposed rule has not been published. The Services in all cases attempt to deal with species reviews in an expeditious manner. The requirement that the Services act only when they believe a species is Endangered or Threatened requires careful evaluation of data not always readily available. To impose a regulatory requirement on the length of reviews is unwise since the data readily available varies greatly from species to species.

One comment contended that this section provided insufficient detail regarding the procedures that would be followed in conducting a review of an action under consideration. This comment is rejected. Extensive procedures for gathering information and consulting interested private organizations and governmental entities are included in the rules. Further requirements along these lines are unnecessary.

One comment suggested that a period be set for receipt of comments solicited by a notice of intent or review to generate additional economic or other information. The Services have rejected this comment. The length of the comment period will vary from case to case, and this preliminary stage of the rulemaking process makes designation of a specific time undesirable. The desirability of maintaining broad flexibility at this stage of the rulemaking is reflected in the Interior Department regulations on rulemaking. See 43 CFR Part 14, implementing Executive Order 12044.

The Services have adopted the suggestion that the notice of review portion of this rule be made a separate section for clarity.

#### § 424.16 Proposed Rules—General

One comment suggested that notification procedures for proposed rules involving Critical Habitat should be applicable to proposed rules which do not designate Critical Habitat. The Services have not accepted this comment. Congress has carefully formulated different procedures for proposed rules involving Critical Habitat, procedures that are particularly useful to questions that may arise in that context. The Services do not believe that they should make such a significant

departure from the carefully formulated congressional scheme.

**§ 424.16(b)(1) Content of Proposed Rule**

One comment suggested that a proposed rule be required to include a citation of appropriate information sources used in preparing the rule. The final rules have been revised to include this requirement.

Several commenters suggested that both supporting and contradictory data be summarized in a proposed rule. The Services agree with the comment, but believe modification of the final rule is unnecessary. The Services intend that proposed listings will contain a summary of all data on which they are based, including that which is contradictory.

The section has been modified slightly to bring it into conformance with the Act. As the final rule indicates, some points must be included in listing and Critical Habitat rulemaking, others for all Endangered Species Act rulemaking.

**Section 424.16(b)(2).** Several comments suggested that the public comment period on proposed rules be lengthened from 45 to 90 days. A number of comments pointed out that State Governors are afforded 90 days to comment, and the public should be given equal time to submit comments. Although Governors are authorized 90 days to comment on rules relating to resident species of fish and wildlife, section 4(b)(1)(C) of the Act authorizes this period to be shortened by agreement between the Service and the Governor. Because the Act itself establishes no specific comment period, the general provisions of the Administrative Procedure Act (APA) apply. Section 553 of the APA provides that the comment period is to remain open for a minimum of 30 days unless good cause is shown. The Services believe that this standard should be applied for proposed rules not listing species or designating Critical Habitat. For rules listing species or designating Critical Habitat, the Services believe a 60-day minimum standard should apply. The rule has been changed to reflect this view.

**Section 424.16(b)(3).** One commenter suggested that notifications to foreign countries be made specifically to the management authorities of such countries. In foreign species listings, notifications are made by the Services through the auspices of the Department of State by normal diplomatic channels. The Services consider it inappropriate to set forth the manner in which this notification should be made.

Several commenters suggested that more specific requirements be

incorporated in this subsection for the notification of State and Federal agencies, interest groups and private individuals of proposed actions. The Services intend to disseminate notices of proposals as widely as is practical and appropriate in individual cases. The manner in which this process will be carried out varies with the situation and further standards are therefore unnecessary.

**Section 424.16(b)(5).** One comment suggested that the time within which one must request a public meeting or hearing should run from the date of newspaper notice rather than from publication in the *Federal Register*. This comment has not been accepted since section 4(f)(2)(B)(iv) (I) and (II) of the Act specifically provide that this period is to run from *Federal Register* publication.

**§ 424.17 Proposed Rules—Additional Procedures for Critical Habitat**

For clarity the Services have adopted a separate section for the additional Critical Habitat requirements in the final rules.

One comment argued that an adjudicatory hearing must be provided upon request for proposed rules designating Critical Habitat. The Services disagree with this view. Although the Act in some cases calls for public hearings for proposed rules designating Critical Habitat, it does not specify that the hearing be "on the record after opportunity for an agency hearing". See *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973) and *United States v. Allegheny-Ludlum Steel*, 406 U.S. 742 (1972). The Services also note that proposed Critical Habitat rules are prospective legislative type rules of general application rather than "quasi-judicial" proceedings to determine the specific rights of particular individuals or entities. The legislative history of the Act also makes clear that adjudicatory hearings are not required, since the Conference Report for the 1978 Amendments specifically provides that "the committee does not intend that either the meetings or hearings be full adversarial proceedings with all the inherent expenses to the parties and delays in carrying out a final regulation." See H. Rept. 95-1804, 95th Cong. 2d Sess. 27 (1978). See also H. Rept. 96-697, 96th Cong. 1st Sess. 10-11 (1979).

A number of comments were received on the proposed timing of public meetings and the manner in which they are to be requested. One comment suggested that the public meeting and hearing be held on the same day. Another suggested that the public

hearing should be held after the public meeting, since the meeting would provide the public with an opportunity to become fully informed about the proposal. The same comment objected to the proposed procedure of requiring an interested person to request a public hearing within 15 days of the public meeting.

In recent amendments to the Endangered Species Act, Congress has made clear that interested persons are to be afforded 15 days after the public meeting to request a public hearing. See section 4(f)(2)(B)(iv)(II). This provision has been implemented in the final rules. The legislative history of the amendments also indicates that Congress intends the public hearing to occur after the public meeting.

The Services retain discretion to conduct a public hearing even if one is not requested. This authority is specifically recognized in the final rules. In the exercise of this authority, the Service may in appropriate cases set a time and place for the public hearing at the same time the proposed rule is published in the *Federal Register*. The effect of this action would be to minimize the added expense of publication and to speed up the rulemaking process.

Another comment suggested that public meetings be held early in the comment period. The Services generally agree that the public meeting should occur early in rulemaking process, but the need for providing adequate notice of its time and location will necessarily result in some delay. For reasons expressed above, the Service also finds it undesirable to require an extended comment period.

One comment suggested that the section be changed to clarify that a public meeting on a Critical Habitat proposal could occur within or adjacent to the area determined as Critical Habitat. The language of the proposed rule is consistent with that of the Act, and has been retained. The Services interpret this provision, however, as authorizing them to conduct the meeting in close proximity to, but outside the Critical Habitat area, when adequate facilities are unavailable therein.

Another comment suggested that the Service establish procedures to ensure that an adequate administrative record is developed for rules. These rules contain numerous provisions implementing requirements intended by Congress to ensure that the Services make fully informed decisions. The Services will continue to compile complete administrative records on which they will base their judgments,

and further procedures are therefore unnecessary.

One comment suggested that Critical Habitat rule summaries be published in all general circulation newspapers in the area of the proposed Critical Habitat. This comment has not been accepted. Recent amendments to the Act specifically provide that publication should occur "in a newspaper of general circulation within or adjacent to such habitat". The Services also believe that benefits from the suggested approach are minimal and are outweighed by the high costs and administrative difficulties that would result if this approach were adopted.

The final rules provide that the Services must send the draft impact analysis to local governments along with the complete text of the proposed and NEPA documents. The intent of this provision is to provide local governments with all relevant data as quickly as possible in the rulemaking process.

Several comments objected to the language contained in the proposal which provides that "any accidental failure to provide actual notice to all such local governments will not invalidate any critical habitat determination." This language has been retained since it is identical to that found in the Act. See section 4(f)(2)(B) of the Act.

One comment questioned whether the "environmental document" referred to in this section was an environmental assessment or impact statement. The intent of the final rules is that any document prepared to carry out NEPA responsibilities will be sent to the appropriate local governments.

One comment suggested that the draft impact analysis should be prepared after the public meeting. The Services disagree with this view. Preparation of a draft impact analysis must occur early in the rulemaking process to ensure its timely availability to interested parties and its timely completion, as well as to aid the Director in reaching his decision to publish a proposed rule. For these reasons, the final rules indicate that the draft analysis will be completed prior to publication of the proposed rule.

Another comment suggested that a public hearing should be held after an impact analysis has been made public. As indicated above, a draft analysis will be completed and available to the public prior to any public hearing. The Services do not believe that the regulations should require that a final impact analysis be completed prior to a public hearing, since valuable information obtained at that time should be reflected in the final document. The Service will,

however, complete a final analysis prior to the publication of a final rule.

One comment suggested that a notice of review be a mandatory step in gathering information concerning possible impacts of a Critical Habitat designation. This comment has been rejected, since the process set out in the rules insures sufficient public input. As noted above, the notice of review is a flexible management tool that should be used only when circumstances warrant. See 43 CFR Part 14.

One comment questioned the apparent reliance of the Services on other Federal agencies for information concerning economic and other impacts associated with designating Critical Habitat. The Services will rely on Federal agencies for this type of information, since those agencies are in the best position to know what future Federal activities may be affected by a Critical Habitat designation. The section has been changed, however, to clarify that relevant information will be gathered from appropriate Federal agencies and, to the extent practicable, other knowledgeable entities.

Another commenter requested that the required draft impact analysis should be published with the proposed rule. The Services have carefully considered this comment, but reject it at this time. Information from the draft will be used in the proposed rule itself, and it appears unnecessary to duplicate this information. The Services also note that the procedure adopted parallels the procedures taken for environmental documents prepared with a listing. Impact analyses are also available on request and will be provided to the Governors, local governments, and appropriate Federal agencies at the time of notification.

One commenter argued that the Services consider more than dollar benefits when designating Critical Habitat. The Services intend to do so in the manner the Act requires, and believe that the final rules express that intent.

#### § 424.18—Final Rules

One comment argued that formal rulemaking was required in certain circumstances and that the procedures for final rules set out in this section were inadequate. As the above discussion on public hearings indicates, rulemaking under the Endangered Species Act is informal rulemaking under the Administrative Procedure Act. Modification of the type suggested is therefore unnecessary as a legal matter, and the associated administrative expense and delay also militate against such procedures from a policy perspective.

One commenter suggested that a final rule be adopted only upon a finding that benefits deriving from its promulgation would outweigh benefits maintained if no action were taken, and in the event the rule were not adopted, the proposal upon which it was based would be withdrawn. The focus of a final rulemaking to list or delist a species is whether or not it is Endangered or Threatened. See section 4(a) of the Act. The Services also believe that the present statutory requirement to withdraw a proposal after two years adequately satisfies the intent of the commenter.

One comment suggested that "new information" should be clarified to include information that did not exist at the time of withdrawal or which had not been fully evaluated by the Service prior to withdrawal. The Services reject this comment; determinations of whether sufficient new information is available will vary considerable from case to case.

One commenter suggested that the two year deadline for finalization of a rule listing a species be applied to rules specifying Critical Habitat. The Services have retained the language of the proposed rules since it comports with that of the Act. The Services note, however, that in most cases Critical Habitat will be designated at the same time a species is listed.

One comment suggested that a final rule should become effective immediately upon its publication due to the threats facing Endangered and Threatened species. The Services have retained the proposed language consistent with section 553(d) of the Administrative Procedure Act 5 U.S.C. 553(d), which provide an effective date 30 days after publication of the final rule unless good cause is found and published with the rule. However, the Service will waive the 30-day period for good cause when warranted.

#### § 424.19—Emergency Rules

One comment suggested that the emergency rules section cover plants as well as fish and wildlife. At the time the proposed rules were promulgated, the Endangered Species Act authorized the use of emergency rules only for fish and wildlife. Recent (December, 1979) amendments to the Act have expanded this authority to include plants, and the final rules reflect this change.

In a similar vein, a comment suggested that the 120 days effective date for emergency rules was too short in light of the numerous requirements for proposing and finalizing rules, and should thus be deleted. This too, had been a statutory limitation. The recent

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						

**§ 17.12 Endangered and threatened plants.**

(a) The list in this section contains all species of plants which are determined by the Director to be Endangered or Threatened. It also contains species of plants treated as Endangered or Threatened because they are similar in appearance to an Endangered or Threatened species (see § 17.50 *et seq.*)

(b) The columns entitled "Scientific Name" and "Common Name" define a species of plant within the meaning of the Act. Although common names are usually included, they cannot be relied upon for identification of any specimen, since they may vary greatly with local usage. The Director will use the most recently accepted scientific name. In cases in which confusion might arise, a synonym will be provided in parentheses. The Services shall rely to the extent practical on the *International Code of Botanical Nomenclature*.

(c) In the "Status" column the following symbols are used: "E" for

Endangered, "T" for Threatened, and "E [or T] (S/A)" for similarity of appearance species.

(d) For informational purposes only the "Historic Range" indicates the general known distribution of the species as reported in the scientific literature. This column does not imply any limitation of the application of the prohibitions in the Act or implementing rules. Such prohibitions apply to all individuals of the species, wherever found. When the list is updated annually, any change in the range will be added.

(e) For informational purposes only, a footnote to the **Federal Register** publication which originally listed the species is provided under the column "When Listed." Footnote numbers to § 17.12 and § 17.11 are in same numerical sequence since plants and animals may be listed in the **Federal Register** document. That document includes a statement indicating the basis for listing.

(f) The "Special Rules" and "Critical Habitat" columns provide a cross-reference to other sections in this Part 17 or Parts 222 or 227. The term "N/A" (not applicable) appearing in either of these two columns indicates that there are no special rules and/or Critical Habitat for that particular species. However, all other appropriate rules in this Part 17 still apply to that species. In addition, there may be other rules in this Title that relate to such plants, e.g., port-of-entry requirements. It is not intended that the references in the "Special Rules" column list all the regulations of the two Services which might apply to the plants in question or to the regulations of other Federal agencies or State or local governments.

(g) The listing of a particular taxonomic group includes all its lower taxonomic units [see § 17.11(g) for examples].

(h) The "List of Endangered and Threatened Plants" is provided below:

**List of Endangered and Threatened Plants (§ 17.12)**

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					

**§ 17.13 [Deleted]**

2. Delete the text and references in the table of sections for § 17.13 at 50 CFR and reserve this section for future rules.

3. Add a new § 17.94 to 50 CFR Part 17, including list of sections, as follows:

**§ 17.94 Critical habitats.**

(a) The areas listed in § 17.95 (fish and wildlife) and § 17.96 (plants) and referred to in the lists at §§ 17.11 and 17.12 have been determined by the Director to be Critical Habitat. All Federal agencies must insure that any action authorized, funded, or carried out by them is not likely to result in the destruction or adverse modification of the constituent elements essential to the conservation of the listed species within these defined Critical Habitats. (See Part 402 for rules concerning this prohibition; see also Part 424 for rules concerning the determination of Critical Habitat).

(b) The map provided by the Director

does not, unless otherwise indicated, constitute the definition of the boundaries of a Critical Habitat. Such maps are provided for reference purposes to guide Federal agencies and other interested parties in locating the general boundaries of the Critical Habitat. Critical Habitats are described by reference to surveyable landmarks found on standard topographic maps of the area and to the States and county(ies) within which all or part of the Critical Habitat is located. Unless otherwise indicated within the Critical Habitat description, the State and county(ies) names are provided for informational purposes only.

(c) Critical Habitat management focuses only on the biological or physical constituent elements within the defined area of Critical Habitat that are essential to the conservation of the species. Those major constituent elements that are known to require

special management considerations or protection will be listed with the description of the Critical Habitat.

(d) The sequence of species within each list of Critical Habitats in §§ 17.95 and 17.96 will follow the sequences in the lists of Endangered and Threatened wildlife (§ 17.11) and plants (§ 17.12). Multiple entries for each species will be alphabetic by State.

**§§ 17.95 and 17.96 [Amended]**

4. Amend §§ 17.95 and 17.96 by deleting the introductory paragraphs before paragraph (a). Further amend both sections by rearranging all species in the sequence followed in the Lists of Endangered and Threatened Wildlife (§ 17.11) and Plants (§ 17.12). This amendment does not contain the republication of these lists or Critical Habitats (§§ 17.95 and 17.96). Future republications and the annual revision of title 50 will reflect this resequencing of the Critical Habitats.

**PART 402—INTERAGENCY COOPERATION****§ 402.05 [Deleted]**

5. Delete § 402.05 entirely.
6. Add a new Part 424 as follows:

**PART 424—LISTING ENDANGERED AND THREATENED SPECIES AND DESIGNATING CRITICAL HABITAT****Subpart A—General Provisions****Sec.**

- 424.01 Scope and purpose.
- 424.02 Definitions.

**Subpart B—Revision of the Lists**

- 424.10 General.
- 424.11 Factors for listing, reclassifying, or removing species.
- 424.12 Criteria for designating Critical Habitat.
- 424.13 Sources of information and relevant data.
- 424.14 Petitions.
- 424.15 Notices of review.
- 424.16 Proposed rules—general.
- 424.17 Proposed rules—additional procedures for Critical Habitat.
- 424.18 Final rules.
- 424.19 Emergency rules.
- 424.20 Periodic review.

Authority: Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

**Subpart A—General Provisions****§ 424.01 Scope and purpose.**

(a) This Part 424 provides rules for revising the Lists of Endangered and Threatened Wildlife and Plants and, where appropriate designating their Critical Habitats. Criteria for determining species to be Endangered or Threatened and for designating Critical Habitats are provided. Procedures for receiving and considering petitions to revise the lists and for conducting periodic reviews of species contained in the lists are also established.

(b) The purpose of this rule is to interpret and implement those portions of the Endangered Species Act of 1973, as amended (16 U.S.C. § 1531 *et seq.*), that pertain to the listing of species and the determination of Critical Habitats.

**§ 424.02 Definitions.**

(a) The definitions of terms in 50 CFR § 402.02 shall apply to this Part 424, except as otherwise stated.

(b) "Conservation," "conserve," and "conserving" mean to use and the use of all methods and procedures which are necessary to bring any Endangered species or Threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with

scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(c) "Critical Habitat" means (1) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (i) essential to the conservation of the species and (ii) which may require special management considerations or protection, and (2) specific areas outside the geographical area occupied by a species at the time it is listed upon a determination by the Director that such areas are essential for the conservation of the species.

(d) "Director" means the Director of the U.S. Fish and Wildlife Service, Department of Interior, or the Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, Department of Commerce, as appropriate.

(e) "Endangered species" means a species which is in danger of extinction throughout all or a significant portion of its range.

(f) "List" or "lists" means the lists of Endangered or Threatened wildlife and plants found at 50 CFR 17.11 or 17.12.

(g) "Plant" means any member of the plant kingdom, including seeds, roots, and other parts thereof.

(h) "Public hearing" means an informal hearing to provide the public with the opportunity to give their comments on a proposal to designate Critical Habitat and, if appropriate, the accompanying proposal to list a species.

(i) "Public meeting" means an informal meeting between Service representatives and the public that permits an exchange of information on a proposed rule.

(j) "Special management considerations or protection" means any methods or procedures useful in protecting physical and biological features for the conservation of listed species.

(k) "Species" includes any species or subspecies of fish or wildlife or plant, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. Excluded are those species of the Class Insecta determined by the Director to constitute a pest whose protection under the provisions of the Act would present an overwhelming and overriding risk to man.

(1) "Threatened species" means any species which is likely to become an Endangered species within the foreseeable future throughout all or a significant portion of its range.

(m) "Wildlife" or "fish and wildlife" means any member of the Animal Kingdom, including without limitation, any vertebrate, mollusk, crustacean, arthropod or other invertebrate and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

**Subpart B—Revision of the Lists****§ 424.10 General.**

The Director may add a species to the lists or designate Critical Habitat, delete a species or Critical Habitat, change the listed status of a species, change the boundary of an area designated as Critical Habitat, or adopt or modify special rules (see 50 CFR 17.40–17.48 and Parts 222 and 227) applicable for an Endangered or Threatened species only in accordance with the procedures of this Part.

**§ 424.11 Factors for listing, reclassifying, or removing species.**

(a) Any species or taxonomic group of species (e.g., genus, subgenus) as defined in § 424.02 is eligible for listing under the Act. A taxon of higher rank than species will be listed only if all component species are individually Endangered or Threatened. In determining whether a particular taxon or population is a species for the purposes of the Act, the Director shall rely on standard taxonomic distinctions and the biological expertise of the Service and the scientific community concerned with that group of taxa.

(b) A species shall be listed if the Director determines on the basis of the best scientific and commercial data available to him after conducting a review of the species' status that the species is Endangered or Threatened because of any one or a combination of the following factors:

(1) The present or threatened destruction, modification, or curtailment of its habitat or range;

(2) Utilization for commercial, sporting, scientific, or educational purposes at levels that detrimentally affect it;

(3) Disease or predation;

(4) Absence of regulatory mechanisms adequate to prevent the decline of a species or degradation of its habitat; and

(5) Other natural or manmade factors affecting its continued existence.

(c) The fact that a species of fish, wildlife, or plant is protected by the

Convention on International Trade in Endangered Species of Wild Fauna and Flora or similar international agreement on such species may constitute evidence that the species is Endangered or Threatened. The weight of the evidence will vary depending on the international agreement in question and the criteria pursuant to which the species was listed under the agreement. The Director shall give full consideration to any species protected by such an international agreement to determine whether the species is Endangered or Threatened.

(d) The factors for removing a species from the list are those in paragraph (b) of this section. The data to support such removal must be the best scientific and commercial data available to the Director to substantiate that the species is neither Endangered nor Threatened for one or more of the following reasons:

(1) *Extinction.* Unless each individual of the listed species was previously identified and located, a sufficient period of time must be allowed before delisting to clearly insure that the species is in fact extinct.

(2) *Recovery of the species.* The principal goal of the Services is to return listed species to a point at which protection under the Act is no longer required. A species may be delisted if the evidence shows that it is no longer Endangered or Threatened.

(3) *Original data for classification in error.* Subsequent investigations may produce data that show that the best scientific or commercial data available at the time that the species was listed were in error.

#### § 424.12 Criteria for designating Critical Habitat.

(a) Critical Habitat shall be specified to the maximum extent prudent at the time a species is proposed for addition to the list. If the Director determines that the designation of Critical Habitat is not prudent, he will state the reasons for such determination in the proposed and final rules listing a species. Conditions under which a designation of Critical Habitat is not prudent include, but are not limited to, the following:

(1) When the species is threatened by taking or other human activity and identification of Critical Habitat can be expected to increase the degree of such threat to the species, or

(2) When such designation of Critical Habitat would not be beneficial to the species.

(b) The Director shall consider in determining what areas are Critical Habitat those physiological, behavioral, ecological, and evolutionary requirements essential to the conservation of the species and which

may require special management considerations or protection. These requirements include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally,

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of listed species.

When considering the designation of Critical Habitat, the Director shall focus on the biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the Critical Habitat description. Primary constituent elements which may be identified include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host animal or plant, pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) The Director shall identify the significant activities which would both affect an area considered for designation as Critical Habitat and be likely to be affected by the designation, and shall consider the reasonably probable economic and other impacts of the designation upon such activities. The Director may exclude any such area from the Critical Habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the Critical Habitat. The Director shall not exclude any such area if he determines, based on the best scientific and commercial data available, that the failure to designate that area as Critical Habitat will result in the extinction of the species.

(d) Each Critical Habitat will be defined by specific prescribed limits using reference points and lines as found on standard topographic maps of the area. Each area will be referenced to the State, county(ies), or other local governmental units within which all or part of the Critical Habitat is located. Unless otherwise indicated within the Critical Habitat descriptions, the names of the State and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral

reference points (e.g., trees, sand bars) shall not be used.

(e) When several suitable habitats are located in close proximity to one another, an inclusive area may be designated as Critical Habitat. Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated Critical Habitat.

(f) The Director shall designate as Critical Habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.

(g) Critical Habitat may be established for those species previously listed as Threatened or Endangered for which no Critical Habitat has been previously established.

(h) Additional Critical Habitat may be added and existing ones may be modified or eliminated, as new data become available to the Director.

#### § 424.13 Sources of information and relevant data.

When considering any revision of the lists, the Director shall consult as appropriate with the affected States, interested persons and organizations, other affected Federal agencies, and, in cooperation with the Secretary of State, with the country or countries in which the species concerned are normally found or whose citizens harvest such species from the high seas. Data reviewed by the Director may include, but are not limited to, scientific or commercial publications, administrative reports, maps or other graphic materials, information received from persons expert on the subject, and comments from interested parties. Prior to proposing a rule to list or remove a species, the Director shall conduct a review of the status of the species.

#### § 424.14 Petitions.

(a) Any interested person may submit a petition to the Director to review the status of any species with a view to taking one of the actions described in § 424.10. Such petitions must be in writing, contain the date submitted, and the name, signature, address, telephone number, and the association, institution, or business, if any, represented by the petitioner. The Director shall acknowledge in writing receipt of the petition within 30 days.

(b) The Director shall determine whether substantial evidence has been presented in support of the measure recommended by a petitioner. "Substantial evidence" is that amount of evidence that would lead a reasonable

person to conclude that the measure proposed in the petition is warranted. In making this determination the Director shall consider whether the petition:

(1) Clearly indicates the administrative measure recommended, the scientific and any common name of the species involved, and if appropriate, the precise area recommended as Critical Habitat;

(2) Contains detailed narrative justification for the recommended measure, describing, based on available information, the past and present numbers and distribution of the involved species, the particular threats confronting the species, and the features and importance of any recommended Critical Habitat;

(3) Indicates any beneficial or adverse effect on the species of designating Critical Habitat;

(4) Provides information on the status of the species over a significant portion of its range; and

(5) Is accompanied by appropriate supporting documentation such as a list of bibliographic references, reprints of pertinent publications, copies of written reports or letters from authorities, and maps, as appropriate.

(c) If the Director finds that substantial evidence has not been presented, the petition shall be denied and the petitioner shall be so notified and advised of the reasons for denial within 90 days. If the petitioner proposes to list, delist, or change the status of a species and the Director finds that substantial evidence has been presented in such petition, the Director shall:

(1) Promptly publish a notice in the *Federal Register* announcing such determination, (2) conduct and publish in the *Federal Register* a status review of the species that is the subject of the petition within 90 days of receipt of the petition and (3) indicate at the time the status review is published how the Service intends to proceed with respect to the listing, delisting, or reclassifying of the species.

(d) If the petition relates only to Critical Habitat or a special rule for the conservation of a species, the Director will promptly conduct a review in accordance with the Administrative Procedure Act (5 U.S.C. 553) and respective departmental regulations and take appropriate action.

#### § 424.15 Notices of review.

If the Director finds that one of the actions described in § 424.10 may be warranted, but that the available evidence is not sufficiently definitive to justify proposing the action, he may publish a notice of review in the *Federal Register*. The notice of review will

describe the measure under consideration, briefly explain the reasons for considering the action, and solicit comments and additional information on the action under consideration. At the time of publication of the notice, notification in writing shall be sent to the Governors of any affected States and the governments of any foreign countries in which the subject species normally occurs. If a Critical Habitat area is involved in the review, notification will also be sent in writing to any Federal agencies and local governments with jurisdiction over lands or waters under consideration and to all general local governments within or adjacent to the potential Critical Habitat.

#### § 424.16 Proposed rules—general.

(a) Based on the initial review conducted pursuant to § 424.14(c), § 424.15, § 424.20, or on other information that the Service has obtained, the Director may propose revising the lists as described in § 424.10.

(b) *Procedures.* (1) *Content of proposed rule.* A proposed rule promulgated to carry out the purposes of the Act will be published in the *Federal Register*. These proposals will include the complete text of the proposed rule, a summary of the data on which the proposal is based (including, when appropriate, citation of pertinent information sources), and the relationship of such data to the proposed rule. Rules proposing the listing, delisting or reclassifying of a species or the designation of Critical Habitat will also include a summary of factors affecting the species and a description of the anticipated effects of the rulemaking if finalized in proposed form.

(2) *Period for public comments.* At least 60 days will be allowed for public comment following publication in the *Federal Register* of a rule proposing the listing, reclassifying, or removal of a species. Except as provided under § 424.17(b)(2), all other proposed rules will be subject to a comment period of at least 30 days following the publication in the *Federal Register*.

(3) *Notification of and comment by governors of affected states and governments of foreign countries.* For proposed rules to list, delist or reclassify a species the Director shall give notice of any proposed rule in writing through the Department of State to the governments of any foreign countries in which the subject species normally occurs or whose citizens harvest such species from the high seas. With respect to resident species of fish and wildlife

the Director shall give notice of any proposed rule in writing to the Governors of the States in which the subject species normally occurs. The Governor(s) so contacted will be allowed 90 days after notification to submit comments and recommendations on the proposed rule except to the extent that such period is shortened by agreement between the Director and Governor(s) concerned.

(4) *Offer for publication.* For rules proposing the listing, delisting or reclassifying of species or designating Critical Habitat the Director shall offer the substance of the *Federal Register* notice proposing the rule for publication in appropriate journals or newsletters of the scientific community.

(5) *Public meetings on proposals not involving Critical Habitat.* If the rule proposes to list, delist or change the status of a species and does not specify Critical Habitat, the Director shall promptly hold a public meeting on the proposed rule within or adjacent to the area in which the species is located, if a request for such a meeting is made in writing by any person to the Director within 45 days after the date of publication of the proposal in the *Federal Register*. The specific locations and times of such meetings will be determined by the Director and published in the *Federal Register*.

#### § 424.17 Proposed rules—additional procedures for Critical Habitat.

(a) In addition to the general procedures for proposed rules in § 424.16, there are additional requirements for proposals involving Critical Habitat.

(b) *Procedures.* (1) *Additional content of proposed rule.* The proposed rule will contain a map of the proposed Critical Habitat and will, to the maximum extent practicable, be accompanied by a brief description of those activities (whether public or private) that might occur in the area and in the opinion of the Director, may adversely modify such habitat or may be affected by designating the area as Critical Habitat.

(2) *Period for public comments.* At least 60 days will be allowed for public comment following publication in the *Federal Register* of a proposal involving Critical Habitat.

(3) *Public meetings or hearings.* If a proposed rule includes Critical Habitat, the Director shall hold a public meeting on the proposal within the area in which such Critical Habitat is located in each State. The specific locations and times of such meetings shall be determined by the director and published in the *Federal Register*. A public hearing shall be held after the public meeting in each State in

which such habitat is proposed, if requested in writing no later than 15 days after a scheduled public meeting. Requests for a public hearing must be addressed to the Director. A public hearing will be held promptly but not sooner than 15 days after notice of the hearing is given unless good cause is shown. The Director may conduct a public hearing on his own motion.

(4) *Other notifications and notices.* When the proposed rule involves Critical Habitat, the Director shall: (i) notify in writing any Federal agencies with jurisdiction over lands included in the area under consideration; (ii) publish a summary of the proposed rule (including a source of further information and a map of the Critical Habitat) in a newspaper of general circulation within or adjacent to such habitat within 30 days of the date of the proposal; and (iii) give actual notice of the proposed rule (including its complete text), draft National Environmental Policy Act documents, and impact analyses prepared on the proposed rule to all general local governments located within or adjacent to the proposed Critical Habitat within 30 days of the date of the proposal. However, any accidental failure to provide actual notice pursuant to paragraph (b)(4)(iii)(c) of this section to all such local governments will not invalidate any Critical Habitat determination.

(5) *Consideration of economic and other impacts.* (i) Upon determining that the proposal of a particular area as Critical Habitat is appropriate for biological reasons, the Director shall gather economic and other information on impacts associated with the Critical Habitat designation on significant activities in the area, contacting appropriate Federal agencies, States, and other knowledgeable entities.

(ii) The Service may publish a notice of intent or review in the **Federal Register** prior to proposal of a rule in order to receive additional economic or other relevant information from the public concerning the area that may be affected by the Critical Habitat designation (see § 424.15).

(iii) The Service shall prepare a draft impact analysis which will consider the beneficial or detrimental economic and other impacts of the Critical Habitat designation. This draft impact analysis is available to the public at the time the proposed rule is published in the **Federal Register**.

#### § 424.18 Final rules.

(a) Prior to the time of a final rulemaking involving Critical Habitat in the proposal, the Service shall prepare a final impact analysis based upon

information contained in the draft impact analysis and that received during the comment period, including information provided at public meetings and hearings. The final impact analysis will analyze and discuss both the beneficial and detrimental economic and other relevant impacts of possible Critical Habitat configurations on significant activities in the area. This analysis will form the basis for the Director's decision as to whether or not to exclude any area from the Critical Habitat. The Director may exclude an area from Critical Habitat upon determining that the benefits of excluding such an area from the Critical Habitat outweigh the benefits of specifying the area as part of the Critical Habitat. However, an area may not be excluded from Critical Habitat if the best scientific and commercial data available, show that the failure to designate that area as Critical Habitat will result in the extinction of the species.

(b) After consideration of public comments and the available data, the Director shall either publish a final rule or publish a notice of withdrawal of the proposal in the **Federal Register**.

(c) *Contents of the final rule.* A final rule promulgated to carry out the purposes of the Act will be published in the **Federal Register**. These proposals will include the complete text of the rule, a summary of the comments and recommendations received on the proposal (including any applicable public hearings), summaries of the data on which the rule is based and the relationship of such data to the final rule, and a description of the anticipated effects of the rulemaking. Final rules that list, delist or reclassify a species or designate Critical Habitat shall also provide a summary of factors effecting the species. A rule involving a Critical Habitat area will also contain a description of the boundaries of such area and a map of any designated Critical Habitat, and will, to the maximum extent practicable, be accompanied by a brief description of those kinds of activities (whether public or private) that might occur in the area and which, in the opinion of the Director, may adversely modify such habitat or be impacted by designation of the area as Critical Habitat.

(d) *Two-year limitation of proposal.* A final regulation adding a species to the lists shall be published in the **Federal Register** not later than two years after the date such rule was proposed. If a final rule is not adopted within this two-year period, the Director shall withdraw the proposed rule and will publish

notice of such withdrawal in the **Federal Register** not later than 30 days after the end of such period. The Director shall not propose a regulation adding to the list any species for which a proposed regulation has been withdrawn under this section unless he determines that sufficient new information is available to warrant the proposal of a rule. Notwithstanding the above provision, the Director may withdraw a proposal voluntarily upon a determination that available information and data do not support the proposal.

(e) *Effective date of the final rule.* Final rules shall become effective not less than 30 days after their publication in the **Federal Register** except as otherwise provided for good cause found and published with the rule. A final rule shall become effective no sooner than 60 days after all of the following have occurred: (1) the last public meeting or hearing on the proposal, (2) general notice of the proposal was published in the **Federal Register**, and (3) notice was given to the general local governments and a summary published in a newspaper of local circulation, if Critical Habitat was part of the proposal.

#### § 424.19 Emergency rules.

Sections 424.16, 424.17, and 424.18 notwithstanding, the Director may by regulation take any action described in § 424.10 if such a measure is warranted by the development of a significant risk to the well being of a species of fish or wildlife or plant. Such rules shall, at the discretion of the Director, be effective immediately on publication in the **Federal Register**. No such action that applies to resident species will be taken until the Director has notified the Governor of the State(s) within which such species is then known to occur. At the time of publication in the **Federal Register** of the emergency rule, the Director shall give detailed reasons why the rule is necessary. An emergency rule shall cease to have force and effect after 240 days unless the procedures described in §§ 424.16, 424.17 (where appropriate), and 424.18 have been complied with during that period. If at any time after issuing an emergency regulation the Director determines, on the basis of the best scientific and commercial data available to him, that substantial evidence does not exist to warrant such regulations, he shall withdraw it.

#### § 424.20 Periodic review.

At least once every five years the Director shall conduct a review of each listed species to determine whether it should be removed from the list, be

changed from an Endangered to a Threatened status, or be changed from a Threatened to an Endangered status. Announcement of which species are under active review will be published in **Federal Register**. Notwithstanding this section's provisions, the Director may review any species at any time based upon a petition (see § 424.14) or other data available to the Service.

Dated: January 30, 1980.

**Lynn A. Greenwalt,**

*Director, Fish and Wildlife Service.*

**Jack W. Gehrinjer,**

*Acting Assistant Administrator for Fisheries,  
National Oceanic and Atmospheric  
Administration.*

[FR Doc. 80-6130 Filed 2-26-80; 8:45 am]

**BILLING CODES 4310-55, 3510-12-M**

# 48 CFR Part 101-11.6 Federal Acquisition Regulation

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Wednesday  
February 27, 1980

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## Part V

### Department of Energy

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Weatherization Assistance for Low-  
Income Persons; Interim Rule

## DEPARTMENT OF ENERGY

## 10 CFR Part 440

## Weatherization Assistance for Low-Income Persons; Amendment of Regulation and Request for Comments

AGENCY: Department of Energy.

ACTION: Interim rule with request for comments.

**SUMMARY:** The Department of Energy is adopting on an emergency basis, amendments to its program for Weatherization Assistance for Low-Income Persons to ameliorate severe hardships resulting from delays in delivery of weatherization assistance to low-income persons, especially the elderly and handicapped. Specifically, the amendment seeks to stimulate and increase production through changes including the following principal modifications:

- Permit payment to hire labor or engage contractors, if volunteers and labor funded in accordance with Comprehensive Employment and Training Act of 1973 are unavailable;
- Increase the maximum allowable expenditure per dwelling unit from \$800 to \$1,000, which amount may be increased up to \$1,600 by the Regional Representative to redress severe shortages of labor;
- Allow the use of low cost/no cost energy conservation measures as an interim approach to weatherization;
- Instead of retaining the nationwide \$240 ceiling on indirect costs, permit a State, with the approval of the Regional Representative, to establish ceilings for the State for weatherization materials, program support and labor;
- Establish greater flexibility for weatherizing rental dwelling units in a multifamily building; and
- Permit DOE to make tentative allocations among the States and to make adjustments based upon production.

DATES: Effective date: February 27, 1980.

**HEARING DATES:** Written comments must be received on or before April 28, 1980. Hearings shall be held on the dates and at the places indicated below, according to procedures set out in supplementary information.

**ADDRESSES:** All comments to Joanne Bakos, Conservation and Solar Energy, Department of Energy, Mail Stop 2221C, 20 Massachusetts Avenue, N.W., Washington, D.C. 20585.

**FOR FURTHER INFORMATION CONTACT:** Carolyn M. Martin, Office of Weatherization Assistance, Department of Energy, 1000 Independence Avenue, S.W., Mail Stop 2H-

027, Washington, D.C. 20585, (202) 252-2204.

Joanne Bakos, Hearings Management, Department of Energy, 20 Massachusetts Avenue, N.W., Mail Stop 2221C, Washington, D.C. 20585, (202) 376-1651.

Richard F. Kessler, Office of General Counsel, Department of Energy, 20 Massachusetts Avenue, N.W., Room 2109, Washington, D.C. 20585, (202) 376-4616.

**SUPPLEMENTARY INFORMATION:**

- I. Introduction
- II. Background of the Program
- III. Changes to the Regulation:
  - A. Labor,
  - B. Allowable Expenditures and Program Support,
  - C. Allocation of Funds,
  - D. Low Cost/No Cost,
  - E. Rental Housing,
  - F. Improvements in Planning,
  - G. Weatherization Materials, and
  - H. Miscellaneous Changes.
- IV. Procedural Requirements
- V. Opportunity for Public Comment
- VI. Environmental and Significance Review

**I. Introduction**

The Department of Energy ("DOE") is amending the regulation for the program for weatherization assistance for low-income persons ("program" or "weatherization program"), 10 CFR Part 440, under the Energy Conservation in Existing Buildings Act of 1976, as amended ("Act"), 42 U.S.C. 6851 *et seq.*

In the past twelve months, DOE has seen progressive increases in home heating expenditures due to escalating energy prices. These increases may result in considerable hardship for low-income persons, especially the low-income elderly and handicapped. While the need for weatherization has dramatically increased, DOE's program has been plagued by cumulative shortfalls in production. Assistance simply is not being delivered in response to the ever-increasing needs of the low-income. Progress has been hampered since the inception of the program. Between August 1977 and December 1979, approximately 240,000 dwellings were weatherized—considerably short of the original goal which called for 753,000 units to be completed by the end of FY 1979. As of December 1979, \$96,000,000 of the \$490.5 million appropriated had been expended for weatherization assistance.

DOE has concluded that it is imperative to take necessary steps immediately to improve the current level of program performance. Low-income persons cannot afford the further delays incident to the normal rulemaking procedure. Immediate action is necessary to ameliorate potential human hardship which may result from further delays in the delivery of weatherization

assistance. Strict compliance with informal rulemaking procedures is likely to cause serious harm because it would delay carrying out the changes made by this issuance. Accordingly, DOE has promulgated today's issuance as an interim final rule, effective immediately.

**II. Background of the Program**

The Act authorized the Federal Energy Administration ("FEA"), which subsequently became part of DOE, to establish a weatherization program to aid low-income people, particularly the elderly and handicapped. Funds are provided to install insulation, storm windows, caulking and weatherstripping, and other improvements to reduce heat loss and conserve energy.

DOE currently makes grants to States, the District of Columbia and Indian tribal organizations. The Governor or his designee applies for, receives and administers the grant funds. The funds are distributed by the States and the District to local governments and non-profit organizations, with a statutory preference being accorded to Community Action Agencies ("CAA's"), to weatherize homes. Indian tribes administer funds and also perform weatherization activities. Funds are allocated by DOE on a formula based on the relative need for weatherization assistance throughout the States. The formula takes into account the number of low-income households in each State and the annual heating and cooling degree days in each State, factored by the percentage of total residential energy used for space heating and cooling.

The Act permits grant funds to be spent for weatherization materials, program, support, administration, some labor and training and technical assistance. Program support includes salaries of on-site supervisors, purchase or lease of equipment and other operating costs such as transportation, rental of warehouse space and insurance of vehicles.

Administrative costs are limited to 5 percent of a grant for grantees and 5 percent of a sub-grant for program operators. The legislation also mandates the use, to the maximum extent practicable, of volunteers and labor funded in accordance with the Comprehensive Employment and Training Act of 1973 ("CETA"), 42 U.S.C. 278 *et seq.* To date, approximately 80 to 85 percent of weatherization workers in the program have been paid by CETA.

The program became operational in 1977. Currently, 49 States (except Hawaii) and the District of Columbia have DOE grants which are being

implemented through sub-grants to more than 1,000 local program operators. Appropriations for the program for fiscal years 1977 through 1980 are \$490.5 million. Reauthorization of the program for FY 1981 has been requested by the President.

Since August 1979, DOE has issued waivers to permit program operators to hire working supervisors or contractors, if labor funded under CETA is unavailable, and to increase the maximum amount which could be spent per dwelling unit. Despite these efforts, problems persisted. Therefore on January 1, 1980 the Secretary of Energy established a temporary Special Project Office which is charged with correcting the situation.

The Special Project Office has been directed to:

- Rapidly expand production;
  - Assure that labor necessary to install weatherization materials will be available;
  - Improve program management; and
  - Decrease the time required to transmit funds to the States and local levels.
- Today's issuance is a first step in accomplishing the mission of the Special Project Office.

### III. Changes to the Regulation

Today's issuance seeks to improve program performance through certain changes to the regulations which include the following principal modifications:

- Permit payment to hire labor or engage contractors, if volunteers and labor funded in accordance with CETA are unavailable;
  - Increase the maximum allowable expenditure per dwelling unit from \$800 to \$1,000, which amount may be increased up to \$1,600 by the Regional Representative to redress severe shortages of labor;
  - Allow the use of low cost/no cost energy conservation measures as an interim approach to weatherization;
  - Instead of retaining the nationwide \$240 ceiling on indirect costs, permit a State, with the approval of the Regional Representative, to establish ceilings for the State for weatherization materials, program support and labor;
  - Establish greater flexibility for weatherizing rental dwelling units in a multifamily building; and
  - Permit DOE to make tentative allocations among the States and to make adjustments based upon production.
- All of the changes are specifically discussed below.

#### A. Labor

(1) *Summary of Changes.* Until today, use of program funds for installation

labor was possible only upon waiver. Under § 440.17 of the rules as amended payments for necessary installation labor not available from other sources will be treated as part of program support and labor costs under § 440.16(a)(1)(ii)(F). Section 440.17(a)(1) permits payments, to the extent permitted by the Department of Labor ("DOL"), to supplement wages paid to training participants and public service employment workers pursuant to CETA. Payments may also be made for labor under § 440.17(a)(2) if the grantee has determined that CETA funded labor and volunteers are unavailable in an area to weatherize dwelling units under the supervision of qualified supervisors. These payments may be made to employ labor, with preference being given to low-income persons eligible to receive training under CETA. Payments may also be made to contractors to install weatherization materials. Preference is to be accorded a non-profit corporation or a business owned by disadvantaged individuals performing weatherization services. Section 440.17(b) authorizes an increase in the per dwelling unit limitation from \$1,000 up to \$1,600 to cover labor costs where the Regional Representative determines, based upon satisfactory documentation, that volunteers or CETA funded laborers are unavailable.

Section 440.16(b) has been revised to permit payment of labor costs other than those authorized under § 440.17 or for on-site supervisors out of administrative funds. Accordingly, a local program operator may expend administrative funds to hire administrative personnel, including an inventory clerk, a weatherization coordinator or secretary, to support weatherization activities.

(2) *The Program's Problem with Labor Costs.* DOE's position on payment of labor costs has evolved over 3½ years of experience with the program and represents DOE's continuing efforts to provide program resources to respond to demonstrated needs at the State and local levels.

In its original final rule for the program, FEA declined to permit payment for labor costs, other than a limited amount for supervisors and foremen, for the following reasons—

"First, the Act requires that funds be applied to the purchase of materials to the maximum extent practicable; second, the Act requires that labor be provided by volunteers and CETA workers to the maximum extent practicable; third, the Act states that financial assistance under the program should supplement, and not supplant, State or local funds in order to maximize the total amount of funding available for weatherization activities; fourth, allowing

labor costs could divert funding from weatherization assistance to a public employment resource and manpower training program. While this latter objective may be independently desirable, the Act does not give FEA a mandate to incorporate it in its weatherization assistance program.

"The determination to prohibit labor as an allowable program expenditure was made only after considerable debate and review. This determination was based in part upon the fact that neither FEA nor the commenters were able to obtain hard data on the number of paid workers needed to supplement volunteers, training participants, and public service employment workers, or firm assurances that adequate CETA positions would be made available to support FEA's weatherization program. Still, the projected availability of large amounts of CETA funds during the period of FEA's weatherization program lends compelling support to the proposition that States will have fully adequate funds to support the installation of the weatherization materials purchased under this regulation. FEA intends to monitor this situation closely during the program year. If FEA determines, after review of ongoing programs and analysis of data regarding the adequacy of manpower, that sufficient volunteers, training participants, and public service employment workers are not available to support this effort, FEA will reconsider this issue, but such reconsideration will necessarily have to include a review of how States used their available CETA funds." 42 FR 27899, 27901 (June 1, 1977).

More than one year later, FEA noted in a proposed rule issued on August 1, 1978, that the lack of sufficient labor to perform weatherization work is one problem which occurred with some frequency in the first year of the program. DOE found these problems could be redressed by "taking actions in areas largely other than modification of the regulations in order to minimize the labor problem." 43 FR 34493 (August 4, 1978). Better coordination between program operators and CETA prime sponsors was the approach recommended by the Comptroller General of the General Accounting Office ("GAO") in a Report to the Congress entitled "Complications in Implementing Home Weatherization Programs for the Poor," HRD-78-149, August 2, 1978, stating:

"We recommend that the Secretaries of Energy and Labor and the Director of CSA jointly establish procedures whereby CETA sponsor program plans are made available to CSA and DOE regional offices for comment before Labor approves them. Such comments will afford Labor direct insight into how well coordinated CETA program sponsors' plans are with national home weatherization program efforts. We also recommend that the Secretaries of Labor and Energy and the Director of CSA establish procedures under the interagency agreement to resolve difficulties that may arise with CETA

program sponsors fulfilling approved planning commitments to support weatherization program efforts." p. 9.

DOE again restated the commitment, in the final rule issued on December 27, 1978, "... to monitor the labor situation to determine if changing circumstances and conditions warrant a change in the regulations." 44 FR 31, 32 (January 2, 1979).

Congressional concern for matching CETA funded labor with program requirements was reflected in section 233 of the National Energy Conservation Policy Act ("NECPA"), Pub. L. 95-619, 92 Stat. 324 *et seq.* which tasks DOE, DOL, CSA and others to coordinate labor requirements for the program with support, to the maximum extent practicable, by CETA funded labor. In carrying out the changes mandated by NECPA, DOE noted in a final rule that it planned to continue to use the on-going interagency working agreement to resolve labor problems. 44 FR 31570 (May 31, 1979).

In a report on the program DOE's Office of Inspector General ("OIG") noted the continuation of what had become chronic problems in obtaining labor. Report on Conditions Adversely Affecting the Weatherization Program for Low-Income Persons, IGA 79-3 (June 12, 1979). The Report notes specific problems with the use of CETA funded labor compounded by changes to CETA made effective April 1, 1979, which may make less labor available for weatherization in some areas. p.2. Accordingly, OIG concluded:

"Since this program is so largely dependent on CETA labor, it is important that labor availability be reasonably assured before allocating funds to grantees and subgrantees. Where labor problems exist, there appear to be two management options—(1) target the program to areas of CETA/volunteer labor availability or (2) obtain relief from restrictions on employing commercial workers." p. 17 (emphasis supplied).

By the summer of 1979, the program had entered a critical period. DOE found that changing circumstances warranted a change regarding payment for labor costs. Sizeable recent increases in the cost of home heating fuels, with the adverse impact on the low-income, made immediate changes necessary. DOE established two waiver procedures to permit payment of labor costs. Under DOE Weatherization Assistance Guide ("WAG") #79-25, August 20, 1979, a State, upon approval of the Regional Representative, would be given authority to increase program support expenditures of a sub-grantee by \$200 per dwelling unit. Program support expenditures could be used to hire working supervisors or contractors to

install insulation. A second waiver procedure was established by WAG #79-27, dated September 25, 1979, whereby the Regional Representative could approve additional expenditures in an area within a State to hire working supervisors or engage contractors, if labor could not be provided through volunteers or CETA.

To date, 44 States have obtained relief under Waiver 1. In 21 of these States, a survey undertaken by DOE indicates that increased expenditures were authorized by the State for approximately 95 percent of the subgrantees. Waiver 2 has been granted in 85 instances as of January 31, 1980.

(3) *Current Status and Continuing Concerns.* DOE and DOL will continue to monitor use of CETA labor, and DOE is particularly concerned that grantees properly ascertain and document the unavailability of labor under CETA before permitting a program operator to make labor payments under § 440.17(a)(2). If DOE finds that labor sources available under CETA are not being employed by program operators or that program funds are not being used to purchase weatherization materials to the maximum extent practicable, DOE will undertake necessary corrective action. In this connection, the Regional Representative will require adequate documentation and justification before authorizing an expenditure in excess of \$1,000 per dwelling unit to pay labor costs under § 440.17(a)(2). DOE expects to provide further guidance concerning the type of information required to obtain this authority.

DOE notes that the "payments to employ labor" referred to in § 440.17 are restricted to on-site personnel who will "install weatherization materials" and therefore do not cover ancillary administrative personnel such as an inventory control person or weatherization coordinator. DOE, however, has decided to provide some additional latitude to pay for certain administrative personnel. Section 440.16(b) has been modified to permit payment of labor costs other than those authorized under § 440.17 or supervisors authorized under § 440.16(a)(ii)(E). Accordingly, payment may now be made for off-site personnel including a weatherization coordinator, inventory clerk or warehouse employee.

DOE also finds that expanded authority to use contractors will require the grantee to provide appropriate control to assure competition for procurements and adequate quality control and to avoid conflicts of interest and self-dealing. DOE expects to provide guidance to grantees on how to establish appropriate procurement

controls. DOE is considering establishing a requirement in the future that no procurements may be made with program funds until the State has established appropriate procurement controls approved by the Regional Representative.

#### *B. Allowable Expenditures and Program Support*

Section 440.16(a) has been revised to raise the maximum expenditure per dwelling unit from \$800 to \$1,000, certain labor costs have been added to the list covered by the maximum expenditure limit, and the umbrella for program support costs of \$240 per dwelling unit is being deleted. Instead, § 440.16(a)(1)(ii) will now require a grantee to establish, with the approval of the Regional Representative, an amount per dwelling unit for program support and labor costs. Labor costs, in accordance with § 440.17, are now treated as a program support cost under § 440.16(a)(1)(ii)(F). To simplify accounting procedures, storage will no longer be treated as a part of the cost of weatherization materials but will be included as a separate item in program support costs under § 440.16(a)(1)(ii)(G).

Prior to this change program support costs were limited to \$240 per dwelling unit. However, DOE has received many letters from members of Congress, State officials and local project directors stating that the \$240 ceiling has been too restrictive. DOE's experience indicates that additional funding in the program support category would allow local weatherization projects to expedite the program in their areas by satisfying the need for additional funds for labor and transportation. In many areas, the prevailing hourly wage rate for untrained weatherization laborers is significantly higher than the wage rate for CETA employees. In at least one area, the wage rate for unskilled laborers is 80 percent higher than the wage rate for CETA employees. Likewise the salaries offered to supervisory weatherization workers are not competitive in this area. Many local projects state that they have been unable to attract and retain an adequate labor force to carry out the program. Program support funds must also cover expenditures for transportation, tools and equipment. Rural areas and sparsely populated regions, in particular, have expressed grave concern over rising transportation costs as a component of the program support category. Imbalance between the labor and transportation costs in relation to material expenditures has resulted in serious management problems in the local agencies.

As a result, DOE has decided to raise the per dwelling ceiling by \$200 and provided that the Regional Representative should be given the authority to determine, in conjunction with the grantee, the appropriate percentage of the grant funds to be used for program support costs and labor. DOE believes that this method will provide the best means of allocating necessary funds for program support while at the same time maximizing the proportion of grant funds that will be used for the purchase of weatherization materials. In each case, the grantee and the Regional Representative will have to agree that program funds are being used to the maximum extent practicable to purchase weatherization materials.

DOE is also taking this opportunity to include storage as a program support cost rather than a cost associated with the purchase of materials. It was also recommended that liability insurance be included as a program support cost. However, DOE is concerned that such an action may unnecessarily limit the funds available to grantees and sub-grantees for liability insurance. DOE feels that it is of the utmost importance that program participants be fully insured and therefore has chosen to retain the treatment of liability insurance as a separate item, free of any dollar limitations.

DOE has found considerable confusion concerning the \$100 limitation on repairs. Repairs refer only to payments made for repair materials or services not otherwise authorized under the regulation. Apparently this point is frequently overlooked. For example, purchase of glass to glaze a window or wood to close a hole in the floor is not subject to the \$100 limitation. These items may be treated as weatherization materials because they are materials used as a patch to reduce infiltration through the building envelope. Moreover, in accordance with § 440.17, a contractor could be employed to install these materials. "Incidental repairs" refer to the purchase of goods which are not weatherization materials or services not requiring the installation of a weatherization material. Examples of incidental repairs are replacement of a leaking pipe or unsafe wiring, either of which prevents proper installation of insulation.

Section 415(c)(2) of the Act sets a per dwelling unit limit of \$800 on the total of many of the costs to which the \$1,000 limit now applies, unless the State policy advisory council requests a greater amount. The DOE believes that present-day circumstances would justify an increase to at least \$1,000 in almost

every event, rendering wholesale requests by State policy advisory councils for waivers up to the \$1,000 amount not worth the effort and extra complexity. Accordingly, § 440.16(d) has been modified to provide that the State policy advisory councils will be deemed to have requested such a waiver, unless they notify the Regional Representative in writing to the contrary by a date certain.

#### C. Allocation of Funds

DOE has revised § 440.10 to provide for a tentative allocation to each State. The final allocation may be readjusted by DOE. The final allocation may be reduced by an amount which DOE has determined a State cannot be expected to spend during the current budget period to meet production goals in the light of currently unexpended financial assistance already obligated to the State. At the same time, DOE may increase the funds provided to a State where DOE has determined the State can use the funds to weatherize additional dwelling units during the current budget period. An additional technical change has been made to enable the Regional Representative, instead of the Secretary, to notify a State of its tentative allocation.

The program has been plagued by the inability of certain States to expend obligated funds. One option would be to deobligate these funds and seek less support for this program in the future. However, this solution would seriously injure the low-income persons which Congress intended to benefit. A second option would be to provide additional financial assistance from current year funds to a State which can provide additional weatherization services to low-income persons by reallocating, as much as possible, surplus assistance from a State which is not using it. This approach would get more money put to productive use. However, broader coverage in one State would be achieved as a result of decreased potential coverage in another State.

The third option is more effective program management by all participants in the program. DOE believes that the third option provides the most appropriate approach. Accordingly, DOE wishes to emphasize its continuing commitment to work with the States to improve program operation. However, DOE notes if improved performance cannot be achieved in this manner, some adjustment of funds may be necessary.

DOE wants to clarify the authority of a State to reallocate financial assistance within the State to meet production goals. A State is required to comply with

a State plan adopted in accordance with § 440.14(a). Nevertheless, a State may reserve reallocation authority in its State plan. States may also fund sub-grantees incrementally, and State plans may designate contingent sub-grantees where appropriate. DOE has revised § 440.14(a) to change the reference to the "amount" each sub-grantee will receive to the "tentative amount." This reflects DOE's policy to encourage the States to make tentative allocations to sub-grantees in their State plan and retain flexibility to reallocate. If a State elects to reallocate financial assistance during a budget period, it will have to provide notice and a public hearing under two circumstances:

(1) Where it is necessary to modify the State plan because funding is to be provided to a sub-grantee which is not in accordance with the approved plan; or

(2) Where the State seeks to reallocate funding from a CAA to another sub-grantee in the same area.

DOE has modified § 440.14(d) to clarify the authority of the Governor to suspend a priority or allocation for a CAA at any time if justified, and not just before the annual submission of a State plan. It should be noted that any reallocation by a State will require appropriate modification of the grant document which will be subject to the approval of the Regional Representative.

#### D. Low Cost/No Cost

DOE has added § 440.18 to permit installation of low cost/no cost weatherization materials as an interim activity. A maximum of 10 percent of the amount to be allocated to a sub-grantee may be used to install low cost/no cost weatherization materials in eligible dwelling units. Installation of these materials will be an interim effort pending more complete weatherization of the dwelling at a later date. The cost per dwelling for low cost/no cost items is limited to \$50, but may be increased by the Regional Representative. These costs are now allowable expenditures under § 440.16(a)(4). Only labor not funded by this program can be used to install low cost/no cost items as an interim measure. When installation of low cost/no cost is an interim measure, the one weatherization per dwelling unit restriction of § 440.16(c)(1) and requirement to use Project Retro-Tech in accordance with § 440.19(b) do not apply.

Low cost/no cost covers the installation of a range of inexpensive weatherization materials including water flow controllers, weatherstripping, caulking, glass patching and insulation for plugging

holes. Installation of these materials is primarily directed toward reducing infiltration with the exception of the water flow controller. The items installed in the low cost/no cost effort would probably be installed in any event. Because only items which are weatherization materials may be used, program funds will be used primarily to install materials which have a long term useful life and do not require frequent replacement. Low cost/no cost will provide a quick and inexpensive means for providing relief for low-income persons and conserving energy while the dwelling unit awaits additional weatherization assistance. Although projections of energy savings using only these interim measures are currently unavailable, significant savings are expected from use of the total range of low cost/no cost measures such as reducing the temperature of the hot water heaters, washing laundry in cold water, lowering thermostat settings and effective use of shades and drapes. DOE is conducting studies on energy savings from full weatherization of a dwelling unit and will incorporate estimates from low cost/no cost in these studies.

In many States, the demand for full weatherization far exceeds the State's production capability to weatherize dwellings, and many low-income persons are on waiting lists. Installation of low cost/no cost materials will provide some immediate relief to these people at a small cost. The Department believes that benefits to the low-income individuals far exceed the cost.

The \$50 cost per dwelling limit was based on hardware store prices of a typical low cost/no cost materials package and experience in DOE sponsored programs. A valid concern was expressed that \$50 would not be sufficient. The concern was addressed by permitting the Regional Representative to increase the limit depending on local conditions. The 10 percent limit on total cost is to insure that the interim low cost/no cost effort will not unduly burden expeditious completion of eligible dwelling units. The restriction upon the use of program funds to pay labor costs to install low cost/no cost materials is intended to limit diversion of resources from more complete weatherization treatment and to maintain the inexpensive feature of low cost/no cost. DOE also notes installation of low cost/no cost is relatively simple and in many cases can be accomplished by inhabitants of the dwelling.

#### *E. Rental Housing*

DOE has revised § 440.15(b) to simplify requirements for weatherizing

multifamily housing. Instead of a general requirement that benefits accrue primarily to low-income persons, a specific test will be applied: Not less than 66 percent of the dwelling units must be eligible dwelling units or restricted to occupancy in the future as eligible dwelling units under a Federal program for rehabilitation or similar improvement of the building. Accordingly, DOE has deleted the reference to weatherizing a vacant dwelling unit previously found in § 440.16(c)(2) and conformed the requirements for an eligible dwelling unit in § 440.20. This change does not permit a vacant building to be weatherized unless weatherization is being performed under a Federal program in accordance with § 440.15(b)(2)(ii). However, a multifamily building containing some vacant dwelling units could be weatherized under § 440.15(b)(2)(i) if 66 percent of the occupied units meet the requirements of an eligible dwelling unit under § 440.20.

The provision of weatherization assistance to occupants of rented housing has long been a problem in this program and the CSA administered weatherization program. In the 1978 GAO Report, "Complications in Implementing Home Weatherization Programs for the Poor", cited above, GAO concluded that "over half the nation's poor who rent rather than own their homes are not benefiting from CSA's weatherization program." The report recommended that CSA take a number of actions to increase assistance to renters, and also recommended that DOE periodically assess the extent of rental weatherization being accomplished under its program. The OIG's Report, cited above, pointed out the lack of emphasis on rental units. The report recommended that DOE establish a position on the priority to be given to rental units.

DOE is limited in the ways it can provide increased flexibility to project operators to deal with rented housing and multifamily buildings. Section 413(b)(2)(B) of the Act requires that "(i) the benefits of weatherization assistance in connection with leased dwelling units will accrue primarily to low-income tenants; (ii) the rents on such dwelling units will not be raised because of any increase in the value thereof due solely to weatherization assistance provided under this part; and (iii) no undue or excessive enhancement will occur to the value of such dwelling units." These requirements increase the difficulty of weatherizing rental dwelling units. For example, program operators

have found a significant number of landlords are reluctant to enter into an agreement not to increase rents because of the improvements to a building provided through weatherization assistance.

Furthermore, program operators report difficulties in obtaining a right of entry from the owner or his or her agent before commencing work upon a building. This is a particular problem in large urban areas in the North East where apartment buildings are often owned by absentee landlords, if local law does not provide for an agent who can act in his behalf.

DOE, nevertheless, believes some immediate improvements can be made to increase weatherization of multifamily buildings. DOE initially determined that § 440.15(b)(2) should be amended to allow the weatherization of multifamily buildings when at least 75 percent of the units are occupied by eligible families. This would be consistent with the requirement that the benefits of weatherization would accrue primarily to low-income tenants. However, it was brought to our attention that this would prevent the weatherization of "triple decker" units in New England if one floor is occupied by an ineligible family. To accommodate this situation, DOE has established the minimum occupancy rate at 66 percent. At this level, the benefits of weatherization would still accrue primarily to the low-income tenants. DOE specifically invites comments with regard to further actions it might take to increase the level of assistance to low-income renters.

#### *F. Improvements in Planning*

Concurrently with the increased flexibility created by the changes discussed above, DOE seeks to clarify the responsibilities of the State to use these new opportunities for more effective operation of the program. Section 440.12(b)(5) has been revised to require the State to designate first the number of dwelling units to be weatherized during the budget period with financial assistance previously awarded and then the number of additional dwelling units which can be completed using all or portion of the tentative allocation. DOE has modified § 440.12(b)(6) to require a production schedule indicating estimated completions on a monthly basis, instead of quarterly. A new § 440.12(b)(11) has been added. It calls for a management plan showing how labor, program support and materials will be provided by a State to meet the monthly production schedule referred to in subparagraph (b)(6). These changes are

intended to emphasize the key management role of the States.

#### G. Weatherization Materials

Appendix A has been revised to include "water flow controllers" and "replacement oil burners." The definition of weatherization materials in § 440.3 has been amended to include water flow controllers.

DOE has promulgated the standard for replacement oil burners for the Residential Conservation Service. See 10 CFR Part 456, Subpart G which was issued by DOE as final rule on October 30, 1979, 44 FR 64602 (November 7, 1979). The program is incorporating the DOE standard for replacement oil burners promulgated in this recent DOE rule by reference. DOE has received numerous requests to permit purchase and installation of replacement oil burners as part of weatherization of a dwelling unit. This modification will now permit this to take place. Water flow controllers have been included because of their extensive use as part of a low cost/no cost approach.

#### H. Miscellaneous Changes

DOE has revised § 440.12(a) and § 440.13(a) to require submission of an application by a State within 90 days after notice is received from the Regional Representative. This change is technical since the earlier formulation required a submission within 90 days of publication of the regulation and did not specifically relate to an annual application cycle.

DOE has revised the nondiscrimination provisions of § 440.15(d) to be consistent to DOE Financial Assistance Regulations, 10 CFR 600.39 and DOE policy in this important area of concern.

DOE has also revised the section on reports, and § 440.23 now makes clear its authority to require reports. There appears to have been some confusion that DOE intended to limit its authority to obtain reports under the Act to quarterly reports. To avoid this misunderstanding, DOE has changed this section to parallel the authority conferred by Congress in the Act. Timely submission of required reports is essential to the orderly and successful operation of the program. DOE will look to the States to meet this requirement. DOE is considering making continued funding contingent upon timely compliance with reporting requirements. This may become necessary where a participant continues to systematically disregard reporting requirements.

#### IV. Procedural Requirements.

We are soliciting comments and will hold hearings indicated below on this rule at the time and places indicated below. DOE will review the comments and other relevant parts of the record and will determine whether the rule should be continued and whether modifications are appropriate. The specific statutory requirements applicable to emergency rulemakings have been satisfied as follows:

##### A. Section 553(b) of the Administrative Procedure Act and Section 501 of the DOE Act

Section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) requires that general notice of proposed rulemaking shall be published in the *Federal Register* unless persons subject to it are named and have actual notice of the proposal. Except when notice or hearing is required by statute, the requirement for a notice of proposed rulemaking does not apply when the agency finds (and incorporates the findings and a brief statement of its reasons) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest.

Under section 501(e) of the Department of Energy Organization Act ("DOE Act"), Pub. L. 95-91 DOE may waive the prior notice and hearing requirements of subsections (b), (c) and (d) of section 501 upon our finding that strict compliance with these requirements is likely to cause serious harm or injury to the public health, safety or welfare.

We believe findings waiving the § 553(b) and § 501 requirements can be made. As noted above, today's changes are necessary to ameliorate hardship among low-income persons. In accordance with § 501, we will receive both oral and written comments on this action within a reasonable period after issuance of this rule as provided in the Comment Procedure.

##### B. Section 553(d) of the Administrative Procedure Act

Section 553(d) of the Administrative Procedure Act requires that a substantive rule will not become effective less than thirty days after its publication. The requirement does not apply to rules which relieve restrictions and also does not apply when the agency promulgating the rule finds good cause to waive this requirement and publishes this finding together with the rule.

The requirement of § 553(d) does not apply. Moreover, the need for immediate

adoption of this rule, for the reasons stated above, provides good cause to waive the § 553(d) requirement.

#### C. Executive Order 12044

The sixty-day advance public comment period and the other procedures required for proposed rulemakings pursuant to Executive Order 12044, entitled "Improving Government Regulations" (43 FR 12661, March 24, 1978) and DOE's implementing procedures, DOE Order 2030.1 (44 FR 1032, January 3, 1979), have been waived by the Under Secretary of Energy for the same reasons that require the rule to be effective immediately.

#### V. Opportunity for Public Comment

##### A. Written Comment Procedures.

Interested persons are invited to participate in this rulemaking by submitting data, views or arguments with respect to the proposals set forth in this notice to Ms. Joanne Bakos, Office of Conservation and Solar Energy, Room 2221C, Department of Energy, 20 Massachusetts Avenue, N.W., Washington, D.C. 20585.

Comments should be identified on the outside of the envelope and on documents with the designation "Weatherization Assistance for Low-Income Persons Regulations (Docket No. CAS-RM-80-508)." Fifteen copies should be submitted. All comments received by April 28, 1980, before 4:30 p.m., and other relevant information, will be considered by DOE.

Any information or data considered by the person furnishing it to be confidential must be so identified, and one copy submitted in writing. DOE reserves the right to determine the confidential status of the information or data and to treat it according to its determination.

##### B. Public Hearings.

DOE has determined that it will hold hearings in five of the ten DOE Regions. Each of the regional hearings will be held beginning at 10:00 AM., local time, on the dates and at the locations specified below.

Any person who has an interest in this proceeding or who is a representative of a group of persons that has an interest in this proceeding may make a written request for an opportunity to make an oral presentation. Such a request should be directed to DOE at the address given below for the appropriate Region, and in accordance with the "Request Procedures" set forth below. Requests must be received before 4:30 PM., local time on March 10, 1980, for the Chicago

hearing, March 11, 1980, for the Denver and Dallas hearings, March 14, 1980, for the Seattle hearing, and March 17, 1980, for the Boston hearing. Requests should be as for written comments, with the additional notation "Request to Speak."

The person making the request should briefly describe the interest concerned, if appropriate, state why she or he is a proper representative of a group of persons that has such an interest, and give a concise summary of the proposed oral presentation and a phone number where she or he may be contacted through March 13, 1980, for the Chicago hearing, March 14, 1980, for the Denver and Dallas hearings, March 17, 1980, for

the Seattle hearing, and March 20, 1980, for the Boston hearing. Each person selected to be heard will be notified by DOE before 4:30 PM. on those dates. Each person selected to be heard must bring fifteen copies of her or his statement to the hearing.

In the event any person wishing to testify cannot provide fifteen copies, alternative arrangements can be made with the appropriate hearing coordinator in advance of the hearing by so indicating in the letter requesting an oral presentation or by calling the appropriate hearing coordinator at the telephone number indicated below.

DOE region	Hearing date	Submit requests to testify to—	Hearing location
I Boston, Mass.	March 27, 1980	Kathy Healy, Department of Energy, 150 Causeway Street, Boston, Mass. 02114, (617) 223-5257.	J. W. McCormack, Post Office and Court-house, Room 208, Post Office Square, Boston, Mass.
V Chicago, Ill.	March 19, 1980	Thomas Sanders, Department of Energy, 175 West Jackson Blvd., Chicago, Ill. 60604, (312) 886-5181.	Ambassador West Hotel, 1300 North State Parkway, Chicago, Ill.
VI Dallas, Tex.	March 21, 1980	Grace Morrison, Department of Energy, P.O. Box 35228, Dallas, Tex. 75235, (214) 767-7736.	Federal Building, Room 7A23, 110 Commerce Street, Dallas, Tex.
VIII Denver, Colo.	March 20, 1980	Tom Stroud, Department of Energy, P.O. Box 26247, Belmar Branch, Lakewood, Colo. 80226, (303) 234-2165.	Post Office Building, Room 269, 1823 Stout Street, Denver, Colo.
X Seattle, Wash.	March 24, 1980	Janet Marcan, Department of Energy, 915 Second Avenue, Seattle, Wash. 98174, (206) 442-7285.	Federal Building, South Auditorium, 915 Second Avenue, Seattle, Wash.

### C. Conduct of Hearing

DOE reserves the right to select the persons to be heard at the hearings, to schedule their respective presentations and to establish the procedures governing the conduct of the hearings. The length of each presentation may be limited, based on the number of persons requesting to be heard.

A DOE official will be designated to preside at the hearings. These will not be judicial or evidentiary-type hearings. Questions may be asked of speakers only by those conducting the hearings, and there will be no cross-examination of persons presenting statements. Any decision made by DOE with respect to the subject matter of the hearings will be based on all information available to DOE. At the conclusion of all initial oral statements at the hearings, each person who has made an oral statement will be given the opportunity if she or he so desires, to make a rebuttal statement. The rebuttal statements will be given in the order in which the initial statements were made and will be subject to time limitations.

Any person wishing to ask a question at the hearings may submit the question,

in writing, to the presiding officer. The presiding officer will determine whether the question is relevant, and whether the time limitations permit it to be presented for answer.

Any further procedural rules needed for the proper conduct of the hearings will be announced by the presiding officer.

Transcripts of the hearings will be made and the entire record of the hearings, including the transcripts, will be retained by DOE and made available for inspection at the DOE Freedom of Information Office, Room GA152, 1000 Independence Avenue, S.W., Washington, D.C. between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday. Any person may purchase a copy of the transcript from the court reporter.

### VI. Environmental and Significance Review

Pursuant to section 7(a)(1) of the Federal Energy Administration Act of 1974, as amended, 15 U.S.C. 766(a)(1), a copy of this was submitted to the Administrator of the Environmental

Protection Agency ("EPA") for his comments concerning the impact of this proposal on the quality of the environment. The Administrator had the following comments:

"EPA supports the proposed amendments to the weatherization program as a means of addressing the severe hardships resulting from delays in delivery of weatherization assistance to low-income persons, especially the elderly and handicapped. We recognize the economic burdens of rapidly escalating home heating costs which these amendments are intended to alleviate. We also support the weatherization program both as a means of reducing our dependence on foreign oil and as a means for reducing outdoor pollutants associated with energy resource development and consumption.

EPA strongly supports those elements of the program designed to improve energy efficiency and reduce heat loss in buildings; however, we have concerns about the build-up of indoor air pollutants and radon concentrations in residences due to those measures specifically designed to reduce air exchange rates. Unless properly ventilated, the indoor residential environment can become a major contributor to an individual's total exposure to air pollution and radon with potential of adverse health effects. This concern has been recognized by the Department of Energy both in DOE's Environmental Assessment for the Weatherization Assistance Program (issued April 1979) and in the Environmental Impact Statement for the Residential Conservation Service Program (issued November 1979).

We therefore, urge the Department of Energy to be sensitive to the health issue of increased indoor air pollution and radon exposure while at the same time addressing the basic economic and human needs of keeping people warm. Our two agencies are jointly developing a public information program on this issue in conjunction with the Residential Conservation Service Program. Furthermore, where feasible, we would encourage DOE to take advantage of opportunities for sound-proofing and pest-proofing residences as part of the weatherization effort."

Pursuant to the National Environmental Policy Act of 1969, as amended, ["NEPA"], 42 U.S.C. 4321 *et seq.*, DOE published a Notice of Availability of an environmental assessment (EA) of the Grants Program for Weatherization Assistance for Low-Income Persons on April 10, 1979 in the Federal Register (44 FR 21323). Based on this EA, DOE determined that the weatherization Assistance Program did not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and that an environmental impact statement (EIS) was not needed to support the action.

DOE has reviewed the environmental impacts of the Weatherization Assistance Program amendments adopted herein. It is DOE's judgment

that the effect of these amendments will be to bring the level of participation in the program up to the levels originally anticipated and originally analyzed in the April 1979 EA. No new or additional environmental impacts are associated with the new amendments, nor do these new amendments require the addition of any new mitigating measures beyond those already contained in the program. It is thus DOE's determination that the environmental impacts of the new Weatherization Assistance Program amendments have been adequately analyzed in the April 1979 EA, and that these impacts are not significant. Hence, no additional EA or EIS is required.

(Energy Conservation in Existing Buildings Act of 1976, as amended, 42 U.S.C. 6851 *et seq.*, Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*)

In consideration of the foregoing, Part 440 of Chapter II of Title 10, Code of Federal Regulations is amended as set forth below effective February 27, 1980.

Issued in Washington, D.C., February 22, 1980.

C. Worthington Bateman,  
Under Secretary (Acting).

10 CFR Part 440 is amended to read as follows:

#### **PART 440—WEATHERIZATION ASSISTANCE FOR LOW-INCOME PERSONS**

Sec.

- 440.1 Purpose and scope.
  - 440.2 Administration of grants.
  - 440.3 Definitions.
  - 440.10 Allocation of funds.
  - 440.11 Native Americans.
  - 440.12 State applications.
  - 440.13 Local applications.
  - 440.14 Administrative requirements.
  - 440.15 Minimum program requirements.
  - 440.16 Allowable expenditures.
  - 440.17 Labor.
  - 440.18 Low cost/no cost weatherization activities.
  - 440.19 Standards and techniques for weatherization.
  - 440.20 Eligible dwelling units.
  - 440.21 Oversight, training, and technical assistance.
  - 440.22 Recordkeeping.
  - 440.23 Reports.
  - 440.30 Administrative review.
- Appendix A—Standards for Weatherization Materials.

**Authority:** Energy Conservation in Existing Buildings Act of 1976, as amended, 42 U.S.C. 6851 *et seq.*; Department of Energy Organization Act, 42 U.S.C. 1701 *et seq.*

##### **§ 440.1 Purpose and scope.**

This part contains the regulations adopted by the Department of Energy to carry out a program of weatherization assistance for low-income persons established by Part A of the Energy

Conservation in Existing Buildings Act of 1976, 42 U.S.C. 6861 *et seq.*, enacted as Title IV of the Energy Conservation and Production Act, Pub. L. 94-385, 90 Stat. 1125 *et seq.*, and amended by Title II, Part 2, of the National Energy Conservation Policy Act, Pub. L. 95-619, 92 Stat. 3206 *et seq.*

##### **§ 440.2 Administration of grants.**

(a) Grant awards under this Part shall be administered in accordance with the following—

(1) Federal Management Circular 73-2, 34 CFR 251, entitled "Audit on Federal Operations and Programs by Executive Branch Agencies;"

(2) Federal Management Circular 74-4, 34 CFR 256 entitled "Cost Principles Applicable to Grants and Contracts with State and Local Governments;"

(3) Federal Management Circular 74-7, 34 CFR 256, entitled "Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments;"

(4) Office of Management and Budget Circular A-89, entitled "Catalog of Federal Domestic Assistance;"

(5) Office of Management and Budget Circular A-95, entitled "Evaluation, Review and Coordination of Federal and Federally Assisted Programs and Projects;"

(6) Office of Management and Budget Circular A-97, entitled "Rules and Regulations Permitting Federal Agencies to Provide Specialized or Technical Services to State and Local Units of Government under Title III of the Intergovernmental Coordination Act of 1968;"

(7) Treasury Circular 1082, entitled "Notification to States of Grant-in-Aid Information;"

(8) DOE Assistance Regulations (10 CFR 600); and

(9) Such procedures applicable to this part as DOE may from time to time prescribe for the administration of grants.

(b) Tools and equipment acquired with grant funds provided under this part shall be the property of the grantee, as more particularly provided for by subparagraph (a)(3) of this section.

##### **§ 440.3 Definitions**

As used in this part—

"Act" means the Energy Conservation in Existing Buildings Act of 1976, as amended, 42 U.S.C. 6851 *et seq.*

"CAA" means a Community Action Agency.

"CETA" means the Comprehensive Employment and Training Act of 1973, 42 U.S.C. 2781 *et seq.*

"Community Action Agency" means a private corporation or public agency established pursuant to the Economic

Opportunity Act of 1964, Pub. L. 88-452, which is authorized to administer funds received from Federal, State, local or private funding entities to assess, design, operate, finance and oversee antipoverty programs.

"Cooling degree days" means a population-weighted annual average of the climatological cooling degree days for each weather station within a State, as determined by DOE.

"Director" means the Director of the Community Services Administration.

"DOE" means the Department of Energy.

"Dwelling unit" means a house, including a stationary mobile home, an apartment, a group of rooms, or a single room occupied as separate living quarters.

"Elderly person" means a person who is 60 years of age or older.

"Eligible State" means any of the forty-eight contiguous States, Alaska, or the District of Columbia.

"Family unit" means all persons living together in a dwelling unit.

"Governor" means the chief executive officer of a State, including the Mayor of the District of Columbia.

"Grantee" means the State or other entity named in the Notification of Grant Award as the recipient.

"Handicapped person" means any individual (1) who is a handicapped individual as defined in section 7(6) of the Rehabilitation Act of 1973, (2) who is under a disability as defined in section 1614(a)(3)(A) or 223(d)(1) of the Social Security Act or in section 102(7) of the Developmental Disabilities Services and Facilities Construction Act, or (3) who is receiving benefits under chapter 11 or 15 of Title 38, United States Code.

"Heating degree days" means a population-weighted seasonal average of the climatological heating degree days for each weather station within a State, as determined by DOE.

"Indian tribe" means any tribe, band, nation or other organized group or community of Native Americans, including any Alaska native village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, Pub. L. 92-203, 85 Stat. 688, which (1) is recognized as eligible for the special programs and services provided by the United States to Native Americans because of their status as Native Americans; or (2) is located on, or in proximity to a Federal or State reservation or rancheria.

"Local applicant" means a CAA or unit of general purpose local government.

"Low income" means that income relation to family size which—

(1) Is at or below 125 percent of the poverty level determined in accordance with criteria established by the Director of the Office of Management and Budget, except that the Secretary may establish a higher level if the Secretary, after consulting with the Secretary of Agriculture and the Director of the Community Services Administration, determines that such a higher level is necessary to carry out the purposes of this part and is consistent with the eligibility criteria established for the weatherization program under section 222(a)(12) of the Economic Opportunity Act of 1964; or

(2) Is the basis on which cash assistance payments have been paid during the preceding 12-month period under Titles IV and XVI of the Social Security Act or applicable State or local law.

"Native American" means a person who is a member of an Indian tribe.

"Number of low-income, owner-occupied dwelling units in the State" means the number of such dwelling units in a State, as determined by DOE.

"Number of low-income, renter-occupied dwelling units in the State" means the number of such dwelling units in a State, as determined by DOE.

"Percentage of total residential energy used for space cooling" means the national percentage of total energy used for space cooling, as determined by DOE.

"Percentage of total residential energy used for space heating" means the national percentage of total energy used for space heating, as determined by DOE.

"Regional Representative" means a Regional Representative of DOE.

"Rental dwelling unit" means a dwelling unit occupied by a person who pays rent for the use of the dwelling unit.

"Repair materials" means items necessary for the effective performance or preservation of weatherization materials. Repair materials include, but are not limited to lumber used to frame or repair windows and doors which could not otherwise be caulked or weatherstripped, and protective materials, such as paint, used to seal materials installed under this program.

"Secretary" means the Secretary of the Department of Energy.

"Separate living quarters" means living quarters in which the occupants do not live and eat with any other persons in the structure and which have either (1) direct access from the outside of the building or through a common hall, or (2) complete kitchen facilities for the exclusive use of the occupants. The occupants may be a single family, one

person living alone, two or more families living together, or any other group of related or unrelated persons who share living arrangements.

"Single-family dwelling unit" means a structure containing no more than one dwelling unit.

"Skirting" means material used to border the bottom of a dwelling unit to prevent infiltration.

"State" means each of the states and the District of Columbia.

"Sub-grantee" means a weatherization project which receives a grant of funds awarded under this part from a grantee.

"Tribal organization" means the recognized governing body of any Indian tribe, or any legally established organization of Native Americans which is controlled, sanctioned, or chartered by such governing body.

"Unit of general purpose local government" means any city, county, town, parish, village, or other general purpose political subdivision of a State.

"Weatherization materials" mean—

(1) Caulking and weatherstripping of doors and windows;

(2) Furnace efficiency modifications limited to—

(i) Replacement burners designed to substantially increase the energy efficiency of the heating system;

(ii) Devices for modifying flue openings which will increase the energy efficiency of the heating system; and

(iii) Electrical or mechanical furnace ignition systems which replace standing gas pilot lights;

(3) Clock thermostats;

(4) Ceiling, attic, wall, floor, and duct insulation;

(5) Water heater insulation;

(6) Storm windows and doors, multiglazed windows and doors, heat-absorbing or heat-reflective window and door materials; and

(7) The following insulating or energy conserving devices or technologies—

(i) Skirting;

(ii) Items to improve attic ventilation;

(iii) Vapor barriers;

(iv) Materials used as a patch to reduce infiltration through the building envelope; and

(v) Water flow controllers.

#### § 440.10 Allocation of funds.

(a) DOE shall allocate financial assistance for each State from sums appropriated for any fiscal year, only upon annual application.

(b) DOE shall determine the tentative allocation for each State from available funds as follows—

(1) The first five million dollars appropriated shall be divided equally among the eligible States; an additional

one hundred thousand dollars shall be allocated to Alaska.

(2) The percentage of the remaining available funds allocated to each eligible State shall be determined by the following formula—

(i) The square of the number of heating degree-days in a State multiplied by the percentage of total residential energy used for space heating;

(ii) Plus the square of the number of cooling degree-days in the State multiplied by the percentage of total residential energy used for space cooling;

(iii) Multiplied by the sum of the number of low-income, owner-occupied dwelling units in the State and one-half of the number of low-income, renter-occupied dwelling units in the State;

(iv) Divided by the sum of the result produced for all States by the computation outlined in subparagraphs (i), (ii), and (iii) of this paragraph; and

(v) Multiplied by 100.

(c) DOE may reduce the tentative allocation for a State by the amount DOE determines cannot reasonably be expended by a grantee to weatherize dwelling units during the budget period for which financial assistance is to be awarded. In reaching this determination, DOE will consider the amount of unexpended financial assistance currently available to a grantee under this part and the number of dwelling units which remain to be weatherized with the unexpended financial assistance.

(d) DOE may increase the tentative allocation of a State by the amount DOE determines the grantee can expend to weatherize additional dwelling units during the budget period for which financial assistance is to be awarded.

(e) The Regional Representative shall notify each eligible State of the tentative allocation for which that State is eligible to apply.

#### § 440.11 Native Americans.

(a) Notwithstanding any other provision of this part, the Regional Representative may determine, after taking into account the amount of funds made available to a State to carry out the purposes of this part, that—

(1) The low-income members of an Indian tribe are not receiving benefits under this part equivalent to the assistance provided to other low-income persons in the State under this part, and

(2) The members of such tribe would be better served by means of a grant made directly to provide such assistance.

(b) In any State for which the Regional Representative shall have made the

determination referred to in paragraph (a) of this section, the Regional Representative shall reserve from the sums that would otherwise be allocated to the State under this part not less than 100 percent, nor more than 150 percent, of an amount which bears the same ratio to the State's allocation for the fiscal year involved as the population of all low-income Native Americans for whom a determination under paragraph (a) of this section has been made bears to the population of all low-income persons in the State.

(c) The Regional Representative shall make the determination prescribed in paragraph (a) of this section in the event a State shall—

(1) Not apply within the 90 day time period prescribed in § 440.12(a);

(2) Recommend that direct grants be made for low-income members of an Indian tribe as provided in § 440.12(b)(10);

(3) File an application which DOE determines, in accordance with the procedures in § 440.30, not to make adequate provision for the low-income members of an Indian tribe residing in the State, or

(4) Have received grant funds, and DOE determines, in accordance with the procedures in § 440.30, that the State has failed to implement the procedures required by § 440.15(a)(7).

(d) Any sums reserved by the Regional Representative pursuant to paragraph (b) of this section shall be granted to the tribal organization serving the individuals for whom the determination has been made, or where there is no tribal organization, to such other entity as the Regional Representative determines is able to provide adequate weatherization assistance pursuant to this part. Where the Regional Representative intends to make a grant to an organization to perform services benefiting more than one Indian tribe, the approval of each Indian tribe shall be a prerequisite for the issuance of a notice of grant award.

(e) Within 30 days after the Regional Representative has reserved funds pursuant to paragraph (b) of this section, the Regional Representative shall give written notice to the tribal organization or other qualified entity of the amount of funds reserved and its eligibility to apply therefor.

(f) Such tribal organization or other qualified entity shall thereafter be treated as a unit of general purpose local government eligible to apply for funds hereunder, pursuant to the provisions of § 440.13.

#### § 440.12 State applications.

(a) To be eligible for financial assistance under this part, a State shall submit an application to DOE in conformity with the requirements of § 440.15 not later than 90 days after the date of notice to apply is received from the Regional Representative. The Regional Representative shall review each timely State application and, if the submission otherwise complies with the applicable provisions of this part, approve a final budget and issue a notice of grant award.

(b) Each application shall include—

(1) The name and address of the State agency or office responsible for administering the program;

(2) A copy of the final State plan prepared after notice and a public hearing in accordance with § 440.14(a), except that an application by a local applicant need not include a copy of the final State plan;

(3) A detailed description of the manner in which the minimum program requirements of § 440.15 will be met;

(4) The budget for total funds applied for under the Act which shall include a justification and explanation of any amounts requested for expenditure pursuant to § 440.16;

(5) The total number of dwelling units proposed to be weatherized with grant funds during the budget period for which assistance is to be awarded (i) with financial assistance previously obligated under this part; and (ii) with the tentative allocation to the State;

(6) A production schedule which shall indicate the number of dwelling units which are expected to be weatherized for each month during the budget period;

(7) An estimate of the number of single-family and multi-family dwelling units to be weatherized;

(8) An estimate of the minimum number of dwelling units to be weatherized where elderly persons reside;

(9) An estimate of the minimum number of dwelling units to be weatherized where handicapped persons reside;

(10) An estimate of the minimum number of dwelling units to be weatherized where Native Americans reside, or a recommendation that a tribal organization be treated as a local applicant eligible to submit an application pursuant to § 440.13(b);

(11) A management plan showing how labor, program support and materials will be provided in a timely manner to achieve the production schedule provided in accordance with subparagraph (b)(6) of this section;

(12) Any determination made in accordance with § 440.14(d) not to

provide funds and the reasons for such determination, except that an application by a local applicant need not include this information; and

(13) Any further information which the Secretary finds necessary to determine whether an application meets the requirements of this part.

#### § 440.13 Local applications.

(a) The Regional Representative shall give written notice to all local applicants throughout a State of their eligibility to apply for financial assistance under this part in the event—

(1) A State, within which a local applicant is situated, fails to submit an application within 90 days after notice in accordance with § 440.12(a); or

(2) The Regional Representative finally disapproves the application of a State pursuant to § 440.30 of this part.

(b) To be eligible for financial assistance, a local applicant shall submit an application pursuant to § 440.12(b) to the Regional Representative within 30 days after receiving the notice referred to in paragraph (a) of this section.

(c) In the event one or more local applicants submit a timely application, the Regional Representative shall combine the hearing on the proposed plan pursuant to § 440.14(a) with a hearing on the intention to deny the timely application of one or more local applicants, as provided in § 440.30, to the maximum extent practicable. Based upon the final plan developed by the Regional Representative, the hearing and information submitted by a local applicant and other interested persons, the Regional Representative shall determine whether or not to award a grant to a local applicant and the amount thereof. The Regional Representative may provide financial assistance to a local applicant to carry out one or more weatherization projects.

#### § 440.14 Administrative requirements.

(a) Before submitting an application, a State shall give not less than 10 days notice of hearing, reasonably calculated to inform prospective sub-grantees, and shall conduct one or more public hearings for the purpose of receiving comments on a proposed State plan. The proposed State plan, which shall identify and describe proposed weatherization projects including a statement of proposed sub-grantees and the amount each will receive, shall be published and made available throughout the State prior to the hearing. The notice for the hearing shall specify that copies of the plan are available and how they may be obtained. A transcript of the hearings shall be prepared and

written submission of views and data shall be accepted for the record.

(b) Subsequent to the hearing, the State shall prepare a final plan which shall identify and describe—

(1) Each area to be served by a weatherization project within the State and shall include for each area—

(i) The number of dwelling units to be weatherized;

(ii) The climatic conditions;

(iii) The type of weatherization work to be done;

(iv) The need for weatherization assistance among low-income persons;

(v) The amount of energy to be conserved;

(vi) Mechanisms for providing sources of labor;

(vii) An estimate of the number of eligible dwelling units in which the elderly reside; and

(viii) An estimate of the number of eligible dwelling units in which the handicapped reside.

(2) The manner in which the plan is to be implemented and shall include—

(i) An analysis of the existence and effectiveness of any weatherization project being carried out by a CAA;

(ii) An explanation of the method used to select each area to be served by a weatherization project;

(iii) The extent to which priority will be given to weatherization of single-family dwelling units for the elderly and handicapped;

(iv) The amount of non-Federal resources to be applied to the program;

(v) The amount of Federal resources, other than DOE weatherization grant funds, to be applied to the program;

(vi) The amount of weatherization grant funds allocated to the State under this part;

(vii) The expected average cost per dwelling to be weatherized, taking into account the total number of dwellings to be weatherized and the total amount of funds, Federal and non-Federal, expected to be applied to the program; and

(viii) the number of rental dwelling units to be weatherized by project, if any.

(3) The approach, including a list of measures to weatherize a dwelling unit, developed by the State in accordance with Project Retro-Tech, Conservation Paper Number 28, as revised July 1979, which shall be applied to each dwelling unit by a subgrantee to determine the optimum set of cost-effective measures, within the allowable expenditures prescribed in § 440.16, to be installed in such dwelling unit.

(c) The plan shall insure that funds received under the Act will be allocated to a CAA carrying out a program under

Title II of the Economic Opportunity Act of 1964, 42 U.S.C. 2809, as amended, or to other appropriate and qualified entities in the State or geographical area so that—

(1) Funds will be allocated to areas on the basis of the relative need for a weatherization project by low-income persons, taking into account the factors referred to in paragraph (b)(1) of this section; and

(2)(i) Funds allocated to a geographical area served by an emergency energy conservation program carried out by a CAA under section 222(a)(12) of the Economic Opportunity Act of 1964, shall be allocated to the CAA, and (ii) priority in the allocation of funds will be given to the CAA in so much of the geographical area served by it as is not served by the emergency energy conservation program.

(d) Paragraph (c)(2) of this section shall not apply if the Governor, or the Regional Representative acting pursuant to § 440.13(c), determines on the basis of a public hearing which may be part of the hearing provided under paragraph (a) of this Section that an emergency energy conservation program carried out by a CAA—

(1) Has been ineffective in meeting the purpose of the Act; or

(2) Is clearly not of sufficient size and cannot in timely fashion develop the capacity to support the scope of the project to be carried out in the area with funds to be granted under this part.

(e) In making a determination pursuant to paragraph (d) of this section, the Governor, or the Regional Representative acting on behalf of the Governor pursuant to § 440.13(c), shall evaluate the performance of the CAA and shall consider—

(1) The extent to which the emergency energy conservation program being carried out achieves the goals of the program in a timely fashion;

(2) The quality of work performed;

(3) The number, qualifications and experience of staff members; and

(4) The ability to secure volunteers, training participants and public service employment workers, pursuant to CETA.

(f) Any eligible local applicant may request in its application that the Regional Representative determine that the allocation requirement and priority set forth in paragraph (c)(2) of this section shall not be applied. In this event, the Regional Representative shall decide whether to make the determination as part of the notice and public hearing procedure required by § 440.30, which hearing may be consolidated by the Regional

Representative with the public hearing required by paragraph (a) of this section.

#### § 440.15 Minimum program requirements.

(a) Prior to the expenditure of any grant funds each grantee shall develop, publish and implement procedures to insure that—

(1) No dwelling unit may be weatherized without documentation that the dwelling unit is an eligible dwelling unit as provided in § 440.20;

(2) Priority is given to identifying, and providing weatherization assistance to elderly and handicapped low-income persons and such priority as the applicant determines is appropriate is given to single-family or other, high-energy-consuming dwelling units;

(3) Financial assistance provided under this part will be used to supplement, and not supplant, State or local funds, and, to the maximum extent practicable as determined by DOE, to increase the amounts of these funds that would be made available in the absence of Federal funds provided under this part;

(4) To the maximum extent practicable, the grantee will secure the services of volunteers, training participants and public service employment workers, pursuant to CETA, to work under the supervision of qualified supervisors and foremen;

(5) The limitations set forth in § 440.14(c) shall be complied with;

(6) To the maximum extent practicable, the use of weatherization assistance shall be coordinated with other Federal, State, local or privately funded programs in order to improve thermal efficiency and to conserve energy;

(7) The low-income members of an Indian tribe shall receive benefits equivalent to the assistance provided to other low-income persons within a State unless the grantee has made the recommendation provided in § 440.12(b)(10); and

(8) The list of measures to weatherize a dwelling unit, developed by the State in accordance with § 440.12(b)(3), after approval by the Regional Representative, is included in copies of Project Retro-Tech which are furnished by the State to subgrantees.

(b) A sub-grantee may weatherize a building containing rental dwelling units using financial assistance for dwelling units eligible for weatherization assistance under § 440.20, where—

(1) The sub-grantee has obtained the written permission of the owner or his agent;

(2) Not less than 66 percent of the dwelling units in the building—

(i) Are eligible dwelling units, or

(ii) Will become eligible dwelling units 180 days, under a Federal program for rehabilitating the building or making similar improvements to the building; and

(3) The grantee has established procedures approved by the Regional Representative, to insure that—

(i) Rents shall not be raised because of the increased value of dwelling units due solely to weatherization assistance provided under this part; and

(ii) No undue or excessive enhancement shall occur to the value of the dwelling units.

(c) Prior to the expenditure of any grant funds, a State policy advisory council shall be established by a State, or by the Regional Representative if a State does not participate in the program, which—

(1) Has special qualifications and sensitivity with respect to solving the problems of low-income persons, including the weatherization and energy conservation problems of these persons;

(2) Is broadly representative of organizations and agencies, including consumer groups, that represent low-income persons, particularly elderly and handicapped low-income persons and low-income Native Americans, in the State of geographical area in question; and

(3) Has responsibility for advising the appropriate official or agency administering the allocation of financial assistance in the State or area with respect to the development and implementation of a weatherization assistance program.

(d) Recipients of DOE financial assistance awards which are provided under DOE Federal Assistance programs shall comply with Part 1040, Chapter X, Title 10 of the Code of Federal Regulations "Nondiscrimination in Federally Assisted Programs" (proposed rule) (10 CFR Part 1040) as published in the Federal Register Volume 43, Number 222, Thursday, November 16, 1978 (pages 53658 through 53676) and when published, as a final rule. 10 CFR Part 1040 provides that no person shall on the ground of race, color, national origin, sex, handicap, or age be excluded from participation in, be denied the benefits of, be subjected to discrimination under, or be denied employment, where the main purpose of the program or activity is to provide employment or when the delivery of program services is affected by the recipient's employment practices, in connection with any program or activity receiving Federal assistance from the DOE.

#### § 440.16 Allowable expenditures

(a) To the maximum extent practicable, the grant funds provided under this part shall be used for the purchase of weatherization materials and related matter described in subparagraph (1). Allowable expenditures under this part include only—

(1) A maximum of \$1,000 for any dwelling unit, except as provided in paragraph (d) of this section, for—

(i) The cost of purchase and delivery of weatherization materials;

(ii) The amount per dwelling unit, determined by a grantee and approved by the Regional Representative, for the cost of program support and labor consisting of—

(A) Transportation of weatherization materials, tools, equipment, and work crews to a storage site and to the site of weatherization work;

(B) Maintenance, operation, and insurance of vehicles used to transport weatherization materials;

(C) Maintenance of tools and equipment;

(D) Purchase or annual lease of tools, equipment, and vehicles, except that any purchase of vehicles shall be referred to DOE for prior approval in every instance;

(E) Employment of on-site supervisory personnel;

(F) Labor costs, in accordance with § 440.17; and

(G) Storage of weatherization materials.

(iii) The cost, not to exceed \$100 per dwelling unit, of incidental repairs, including repair materials and repairs to the heating source necessary to make the installation of weatherization materials effective.

(2) The cost of liability insurance for weatherization projects for personal injury and for property damage;

(3) Allowable administration expenses under paragraph (b) of this section; and

(4) The cost of carrying out low cost/ no cost weatherization activities in accordance with § 440.18.

(b) Not more than 5 percent of each grant made pursuant to this part may be used for the administrative expenses of the grantee, and not more than 5 percent of each amount allocated to a subgrantee under this part may be used for administrative expenses of the subgrantee. Allowable administrative expenses shall include any labor costs other than labor costs in accordance with subparagraphs (a)(1)(ii)(E) and (F) of this section.

(c) No grant funds awarded under this part shall be used for any of the following purposes—

(1) To install or otherwise provide weatherization materials for a dwelling unit weatherized previously with grant funds under sub-paragraph (a)(1) of this section unless such dwelling unit has been damaged by fire, flood, or act of God and repair of the damage to weatherization materials is not paid for by insurance; or

(2) To weatherize a dwelling unit which is designated for acquisition or clearance by a Federal, State, or local program within twelve months from the date weatherization of the dwelling unit would be scheduled to be completed.

(d) The limitation of \$1,000 described in paragraph (a) of this section—

(1) Shall not apply if the State policy advisory council requests a greater amount be provided for specific categories of units or materials in the State, and the Regional Representative approves the request; and

(2) Shall be deemed to have been requested and approved under section 415(c)(2) of the Act, unless the State policy advisory council notifies the Regional Representative to the contrary in writing within 30 days of submission of the annual State application.

#### § 440.17 Labor.

(a) Payments for labor costs under § 440.16(a)(1)(ii)(F) shall consist of—

(1) Payments permitted by the Department of Labor to supplement wages paid to training participants and public service employment workers pursuant to CETA; and

(2) Payments to employ labor (particularly persons eligible for training under CETA) or engage a contractor (particularly a non-profit organization or a business owned by disadvantaged individuals which performs weatherization services), to install weatherization materials, provided a grantee has determined an adequate number of volunteers and training participants and public service employment workers, assisted pursuant to CETA, are not available to weatherize dwelling units for a subgrantee under the supervision of qualified supervisors.

(b) The Regional Representative may increase the limitation of \$1,000 per dwelling unit described in § 440.16(a) to not more than \$1,600 per dwelling unit to cover costs referred to in paragraph (a) of this section in an area where the Regional Representative, based upon satisfactory documentation, determines that there are an insufficient number of volunteers and training participants and public service employment workers, assisted pursuant to CETA, available to weatherize dwelling units for a sub-

grantee under the supervision of qualified supervisors.

**§ 440.18 Low cost/no cost weatherization activities.**

(a) An eligible dwelling unit may be weatherized without regard to the limitations contained in § 440.16(c)(1) or § 440.19(b) from funds designated by the grantee for carrying out low cost/no cost weatherization activities, provided—

(1) Inexpensive weatherization materials are used such as water flow controllers or items which are primarily directed towards reducing infiltration, including weatherstripping, caulking, glass patching and insulation for plugging; and

(2) No labor paid with funds provided under this part is used to install weatherization materials referred to in paragraph (a)(1) of this section.

(b) A maximum of 10 percent of the amount allocated to a sub-grantee and not to exceed \$50 per dwelling unit may be expended to carry out low cost/no cost weatherization activities, unless the Regional Representative approves a higher expenditure per dwelling unit.

**§ 440.19 Standards and techniques for weatherization.**

(a) Only weatherization materials which meet or exceed standards prescribed in Appendix A shall be purchased with funds provided under this part.

(b) A weatherization project shall utilize the approaches to weatherization contained in Project Retro-Tech, Conservation Paper Number 28, as revised July 1979, including the energy conservation techniques therein.

**§ 440.20 Eligible dwelling units.**

No dwelling unit shall be eligible for weatherization assistance under this part unless it will be occupied in accordance with the provisions of § 440.15(b)(2)(ii) or is occupied by a family unit—

(a) Whose income is at or below 125 percent of the poverty level determined in accordance with criteria established by the Director of the Office of Management and Budget; or

(b) Which contains a member who has received cash assistance payments under Title IV or XVI of the Social Security Act or applicable State or local law during the 12-month period preceding the determination of eligibility for weatherization assistance.

**§ 440.21 Oversight, training, and technical assistance.**

(a) The Secretary and the appropriate Regional Representative, in coordination with the Director, shall monitor and evaluate the operation of projects

carried out by CAA's receiving financial assistance under this part through on-site inspections, or through other means, in order to insure the effective provision of weatherization assistance for the dwelling units of low-income persons.

(b) DOE shall also carry out periodic evaluations of a program and weatherization projects that are not carried out by a CAA, and that are receiving financial assistance under this part.

(c) The Secretary and the appropriate Regional Representative, the Comptroller General of the United States, and for a weatherization project carried out by a CAA, the Director or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, information, and records of any weatherization project receiving financial assistance under the Act.

(d) Each grantee shall conduct, on an annual basis, an audit of the pertinent records of any sub-grantee receiving financial assistance under this part.

(e) The Secretary may reserve from the funds appropriated for any fiscal year an amount, not to exceed 10 percent, to provide, directly or indirectly training and technical assistance to any grantee or sub-grantee.

**§ 440.22 Recordkeeping.**

Each grantee or sub-grantee receiving Federal financial assistance under this part shall keep such records as DOE shall require, including records which fully disclose the amount and disposition by each grantee and sub-grantee of the funds received, the total cost of a weatherization project or the total expenditure to implement the State plan for which such assistance was given or used, the source and amount of funds for such project or program not supplied by DOE and such other records as DOE deems necessary for an effective audit and performance evaluation. Such recordkeeping shall be in accordance with Federal Management Circular 74-7 and any further requirements of this regulation or which DOE may otherwise establish under the terms and conditions of a grant.

**§ 440.23 Reports.**

DOE may require any recipient of financial assistance under this part to provide, in such form as may be prescribed, such reports or answers in writing to specific questions, surveys or questionnaires as DOE determines to be necessary to carry out its responsibilities or the responsibilities of the Director under this part.

**§ 440.30 Administrative review.**

(a) If a timely application submitted by a State fails to meet the requirements of this part and the Regional Representative intends to deny the application, the Regional Representative shall return the application to the State together with a written statement of reasons therefore.

(b) The State will have a reasonable period, as determined by the Regional Representative, to amend its application and to resubmit it by a specified date for reconsideration.

(c) The Regional Representative shall give notice to the applicant in the event that the Regional Representative determines that—

(1) Any application resubmitted by a State in accordance with paragraph (b) of this section fails to comply with this regulation;

(2) Any application returned to a State pursuant to paragraph (a) of this section is not timely resubmitted as provided in paragraph (b); or

(3) The Regional Representative intends to deny the application of a local applicant.

(d) The Regional Representative shall give notice to a grantee in the event the Regional Representative finds there is a failure by the grantee to comply substantially with the provisions of the Act or this part.

(e) The Regional Representative shall issue such notice in the form of written notice mailed by registered mail, return receipt requested, to the State, local applicant grantee and other interested parties, including—

(1) A statement of reasons for a determination referred to in paragraph (c) or (d) of this section which the Regional Representative intends to make including an explanation whether any amendments or other actions would result in compliance with the regulation;

(2) The date, place, and time of public hearing to be held by the Regional Representative one subject of which shall be the proposed determination, which hearing shall in no event be later than 15 working days after the receipt of such notice; and

(3) The manner in which views may be presented.

(f) A party which has received notice under paragraph (e) of this section—

(1) May make a written submission of its views with supporting data and arguments to the Regional Representative on or prior to the date of the public hearing; and

(2) Shall be afforded an opportunity to make an oral presentation at the public hearing.

(g) The Regional Representative shall consider all relevant views and data

including arguments and other submissions made at the public hearing. The Regional Representative shall make, not later than 5 working days after the public hearing, a final determination in writing stating the reasons for the determination.

(h) A State or local applicant or grantee may appeal in writing from an adverse final determination made by the Regional Representative under paragraph (g) of this section to the Secretary not later than 10 working days after receipt of the Regional Representative's determination. The Secretary shall have 21 working days to consider the appeal and take any action with respect thereto which he deems appropriate. Any action taken by the Secretary shall be the final determination of DOE. If no action has been taken by the Secretary after the expiration of the 21-working-day period, the Secretary shall be deemed to have approved the determination of the Regional Representative.

(i) Anything herein to the contrary notwithstanding, the public hearing referred to in subparagraph (e)(2) of this section may be combined, at the discretion of the Regional Representative, with any other public hearing in the State conducted pursuant to this part.

(j) Upon issuance of the notice provided in paragraph (d), the Regional Representative may suspend payments to any grantee pending a final determination. If the Regional Representative makes a final determination of failure to comply, the grantee will be ineligible to participate in the program under this part unless and until the Regional Representative is satisfied that there is no longer a failure to comply.

#### APPENDIX A.—Standards for Weatherization Materials

Insulation—Mineral fiber, material or product:	Standards
Blanket/batt.....	Conformance to F.S. HH-I-521E and ASTM C665-70.
Board.....	Conformance to F.S. HH-I-526C and ASTM C612-70 or C726-72.
Duct material.....	Conformance to F.S. HH-I-558B.
Loose fill.....	Conformance to F.S. HH-I-1030A and ASTM C764-73.
Insulation—Mineral cellular:	
Aggregate board.....	Conformance to F.S. HH-I-529B.
Cellular glass.....	Conformance to F.S. HH-I-551E and ASTM C552-73.
Perlite.....	Conformance to F.S. HH-I-574A and ASTM C549-73.
Vermiculite.....	Conformance to F.S. HH-I-585B and ASTM C516-67.
Insulation—Organic fiber:	
Cellulose—Type I..	Conformance to F.S. HH-I-515C and ASTM C739-73 (loose fill).
Cellulose—Type II..	Conformance to ASTM C739-73 (loose fill) and fire safety requirements. <sup>2</sup>
Vegetable.....	Conformance to F.S. HH-I-528B and fire safety requirements.

#### APPENDIX A.—Standards for Weatherization Materials—Continued

	Standards
Board and block.....	Conformance to F.S. LLL-I-535A and ASTM C208-72 and fire safety requirements.
Insulation—Organic cellular:	
Polystyrene board..	Conformance to F.S. HH-I-524B and ASTM C578-69 and fire safety requirements.
Urethane board.....	Conformance to F.S. HH-I-530A and ASTM C591-69 and fire safety requirements.
Flexible unicellular.	Conformance to F.S. HH-I-573B and ASTM C534-70 and fire safety requirements.
Insulation—Air Spaces:	
Reflective.....	Conformance to F.S. HH-I-1252A.
Storm Windows:	
Aluminum frame.....	Equivalent to ANSI A134.3-1972.
Wood frame.....	Conformance to Sec. 3 NWMA Industry Standard I.S.2-73.
Rigid Vinyl frame.....	Conformance to NBS Product Standard PS26-70 and performance guarantee.
Frameless plastic glazing.	Required minimum thickness 6 mil (0.006 in.).
Storm doors:	
Aluminum.....	Equivalent to ANSI A134.4-1972.
Wood.....	
Pine.....	Conformance to Sec. 3 of NWMA I.S.5-73.
Fir, hemlock, spruce.	Conformance to Sec. 3 of FHDA/5-75.
Hardwood veneered.	Conformance to Sec. 3 of NWMA I.S.1-73.
Rigid vinyl.....	Conformance to NBS Product Standard PS26-70 and performance guarantee.
Caulks and sealants.....	Commercial availability.
Weatherstripping.....	Commercial availability.
Vapor barriers.....	Commercial availability.
Clock thermostats.....	Commercial availability.
Skirting.....	Commercial availability.
Items to improve attic ventilation.	Commercial availability.
Materials used as a patch to reduce infiltration through the building envelope.	Commercial availability.
Water Flow Controllers.	Commercial availability, but not to exceed \$5.00.
Replacement Oil Burners.	UL 296/ANSI Z 96.2-1974 "Oil Burners" and ANSI Z 91.2-1976, entitled "Performance Requirements for Automatic Pressure Oil Burners of the Mechanical-Draft Type."

#### Notes

<sup>1</sup>F.S. means Federal specifications as cited, copies of which may be obtained from Specifications Sales, Building 197, Washington Naval Yard, General Services Administration, Washington, D.C. 20407.

<sup>2</sup>For fire safety requirements, see Sec. 2.1.3.1 of NBSIR 75-795 which may be obtained from DOE.  
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